IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1177

WHITE MOUNTAIN APACHE TRIBE, et al.,

Petitioners,

vs.

ROBERT M. BRACKER, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS DIVISION ONE

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The White Mountain Apache Tribe, a recognized tribe of American Indians, and Basin Building Materials Co. and E. H. Loveness Lumber Sales Co., Oregon corporations doing business in Arizona as "Pinetop Logging Company," petition the Court to issue a Writ of Certiorari to review the judgment and opinion of the Arizona Court of Appeals, Division I, entered in this proceeding on June 29, 1978.

OPINION BELOW

The opinion of the Arizona Court of Appeals, Div. I (App. at 24a-33a), is reported at 585 P.2d 891. The judgments of the Arizona Superior Court (App. at 19a-23a) are unreported, as is the order of the Arizona Supreme Court (App. at 37a) denying review.

JURISDICTION

The order and opinion of the Arizona Court of Appeals are dated June 29, 1978. A Motion for Rehearing was denied by that court on August 28, 1978. A Petition for Review by the Arizona Supreme Court denied on October 4, 1978. This Petition for Writ of Certiorari is filed within 90 days of October 4, 1978. Jurisdiction is conferred on this Court by 28 U.S.C. Sec. 1257(3) (1970).

QUESTIONS PRESENTED FOR REVIEW

1. Whether 25 U.S.C. Secs. 196, 406 and 407 (1976) and 25 C.F.R. Secs. 141 and 142 (1978), under which Indian reservation timber is comprehensively regulated, preempt the states from taxing the gross receipts of a non-Indian agent of a tribal timber enterprise earned entirely from hauling tribal timber

for the Tribe on its reservation on tribal and BIA roads.

2. Whether such federal regulation of Indian reservation timber also preempts the states from taxing motor fuel consumption by a non-Indian agent of a tribal timber enterprise used to haul such timber for the Tribe on its reservation on tribal and BIA roads.

3. Whether the Arizona Enabling Act, 36 Stat. 557, 569, Sec. 20 (1910), in which Arizona disclaims absolute jurisdiction and control over tribal lands in favor of the Congress, prevents Arizona from regulating Indian reservation lands by conditioning the use of on-reservation tribal and BIA roads by non-Indian agents of a tribal timber enterprise upon the payment of state taxes for the privilege of using those roads and for consuming motor fuel to use those roads.

4. Whether 25 C.F.R. Sec. 1.4(a) (1978), which forbids the application of all state laws to the use or development of restricted real or personal property belonging to an Indian tribe and used or held under agreement with an Indian tribe, bars Arizona from taxing the gross receipts and motor fuel consumption of

non-Indian agents of a Tribe for hauling restricted tribal timber on tribal and BIA roads on reservation trust lands.

5. Whether state taxation of gross receipts of, and motor fuel consumption by, non-Indian agents of a tribal timber enterprise for hauling tribal timber on the reservation on tribal and BIA roads as a part of a tribal timber management, harvesting, manufacturing and marketing program infringes on tribal government in violation of the doctrine of Williams v. Lee, 358 U.S. 217 (1959).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The constitutional provisions, statutes, and regulations involved, which are set out verbatim in the Appendix, are U.S. Const. Art. I Sec. 8 and Art. IV Sec. 3; 25 U.S.C. Secs. 196, 406, 407 and 476 (1976); Arizona Enabling Act, 36 Stat. 557, 569 (1910); 25 C.F.R. Secs. 1.4, 141 and 142 (1978); Amended Constitution and Bylaws of the White Mountain Apache Tribe of the Fort Apache Indian Reservation, Arizona; Ariz. Rev. Stat. Secs. 28-1551, 28-1552, and 28-1556 (1976); and Ariz. Rev. Stat. Secs. 40-601, 40-641 (1974).

STATEMENT OF THE CASE

A. FACTS

Petitioner White Mountain Apache Tribe of Indians resides on the Fort Apache Indian Reservation in the White Mountains of eastern Arizona. Some 720,000 acres of the reservation is commercial forest. The Tribe supports its governmental activities almost exclusively from business enterprises conducted on its reservation, of which its timber operations are by far the most important.

The Tribe's business organization for the management, harvesting, milling and sale of tribal timber is the Fort Apache Timber Company (FATCO), which is created by the Tribal Council pursuant to the Tribal Constitution and is a part of the Tribe.[1/] FATCO conducts its operations entirely on the reservation.

Timber located on Indian reservation trust land is owned by the United States for the benefit of the

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1/ See generally, White Mountain Apache Indian Tribe v. Shelley, 197 Ariz. 4, 480 P.2d 654 (1971); Graves v. White Mountain Apache Tribe, 117 Ariz. 32, 570 P.2d 803 (App. 1977).

Tribe.[2/] Pursuant to statutory authority, the Bureau of Indian Affairs has entered into agreements to allow FATCO to harvest, mill, and sell reservation timber.

Although the entire timber enterprise is conducted by the Tribe itself under the close supervision of the BIA, portions of the operation have been contracted out. Independent loggers fell the trees, load them onto trucks, and carry them to the Tribe's sawmill. Among these independent loggers are petitioners Basin Building Materials Co. and E. H. Loveness Lumber Sales Co., Oregon corporations which have been logging for the Tribe since 1969 as "Pinetop Logging Company." All Pinetop's business activities in Arizona are confined to the Fort Apache Indian Reservation.

The Federal Government, through the Bureau of Indian Affairs, pervasively supervises and controls the timber activities of FATCO and of its contract loggers such as Pinetop. The BIA partly carries out its duty of regulating and planning the use of Indian forests to

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2/ United States v. Shoshone Tribe of Indians, 304 U.S. 111 (1938); United States v. Klamath and Moadac Tribes, 304 U.S. 119 (1938); see generally, U.S. Dept. of Interior, Federal Indian Law 652-62 (1958).

the best advantage of the Indians through contracts between the BIA and the Tribe and through contracts between the Tribe and its loggers, which deal with many matters not covered in the Code of Federal Regulations. The terms of these contracts are dictated and enforced by the BIA. By this means the BIA determines, among other things, exactly who may haul for the Tribe and what prices may be charged for such services.

That duty is also carried out by intensive day-to-day supervision of all parts of the activities of FATCO and Pinetop. The BIA foresters supervise the marking, cutting and hauling of timber by FATCO and its contractors. They decide how much timber will be cut, which trees will be felled, where brush may be piled, where and when roads will be built for harvesting timber, which roads may be used and when, and how roads shall be maintained.

BIA officials together with Tribal employees grade the timber for manufacture into lumber or pulpwood chips. The Bureau regulates many facets of the hauling of logs, such as speed, permissible road conditions, safety, and the width, length, height, weight, and

binding of loads and what type of tractors may be used. The BIA even gives daily instructions to Pinetop's employees.

The affidavit of the head BIA forester with responsibility over the Fort Apache Indian Reservation states that the federal rules and regulations encompass "all aspects of forest utilization and management, including extensive rules and regulations governing in detail the planning, engineering, construction, maintenance and general regulation of all roads used by loggers."

There are three types of roads on the Fort Apache Indian Reservation. Some roads are constructed by the BIA and some by the Tribe itself. In a few places, State highways cross the reservation. Tribal loggers such as Pinetop are sometimes required to construct roads for harvesting timber, and they spend substantial amounts of money to build and maintain these tribal roads, which are not supported in any way by State funds. Thus, passable roads throughout the mountainous reservation result as an important "by-product" of the Tribe's timber enterprise.

Although the Tribe's constitution (App. at 55a-59a), which is authorized by 25 U.S.C. Sec. 476 (1976)

and approved by the Secretary of the Interior, allows it to tax both members and non-members doing business on the reservation subject to review by the Secretary, the Tribe has not levied any tax on loggers doing business with it either for the privilege of doing business on the reservation or for their consumption of motor fuel. Since such loggers are doing business by contract with the Tribe itself, any such tax would become a cost of doing business which would in turn be passed back to and borne by the Tribe.

It was originally anticipated that Pinetop would not be subject to Arizona's use fuel or motor carrier license taxes, and the contract price for Pinetop's services negotiated between it and the Tribe reflected that assumption. Since the State asserted these tax liabilities in 1971 the Tribe has been forced to agree to pay any such taxes which may be held valid in order to avoid losing the hauling services of Pinetop.

Contract motor carriers of property as defined in Ariz. Rev. Stat. Sec. 40-601 (1974) are taxed at 2.5% of their gross receipts under Ariz. Rev. Stat. Sec. 40-641 (1974) to support "the maintenance of Arizona

highways from parties who enter into business arrangements which look directly to the inordinate use of public highways to realize pecuniary benefits."[3/] This motor carrier license tax is required of persons who carry property for compensation by motor vehicle on "any public street, alley, road, highway or thoroughfare of any kind used by the public or open to the use of the public as a matter of right for the purpose of vehicular traffic." Ariz. Rev. Stat. Sec. 40-601(A)(11) (1974).

Ariz. Rev. Stat. Sec. 28-1552 (1976) levies a tax at the rate of eight cents per gallon upon fuel used in the propulsion of a motor vehicle on "any highway within the state," which includes "any way or place in the state of whatever nature open to the use of the public." Ariz. Rev. Stat. Sec. 28-1551(4) (1976). The tax is levied "for the purpose of partially compensating the state for the use of its highways." Ariz. Rev. Stat. Sec. 28-1552 (1976).

Pinetop uses substantial amounts of motor fuel in its logging and hauling operations on the Fort Apache

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3/ Campbell v. Commonwealth Plan Inc., 101 Ariz. 554, 557, 422 P.2d 118, 121 (1966).

Indian Reservation. Almost all of that fuel is used to propel its trucks and tractors along BIA and tribal roads for which the State of Arizona has no responsibility and which it spends no money to build or maintain. Pinetop's vehicles are required to pass across State highways at a few locations, and accurate records are maintained as to the small amount of fuel used on such State highways. Use fuel taxes and motor carrier license taxes have been paid for such mileage and are not involved in this lawsuit, which concerns taxes allocable to use off of State highways.

Between November 1971 and May 1976, Pinetop paid under protest to the State of Arizona $19,114.59 in use fuel taxes and $14,701.42 in motor carrier license taxes. Additional amounts continue to be paid under protest pending the outcome of this litigation.

B. PROCEDURAL HISTORY

Petitioner Pinetop Logging Co. began paying these taxes under protest in November, 1971, soon after the Respondent state authorities first claimed they were owing. Pinetop then brought this action for refund on December 8, 1971.

The suit was broadened by the First Amended Complaint filed in February, 1974,[4] which joined the Tribe as an additional plaintiff and sought also declaratory and injunctive relief against collection of the taxes.[5]

The claims to immunity from the state taxes under federal Indian law principles were raised in the Complaint and refined in the First Amended Complaint. (App. at 1a-18a) The Superior Court granted partial summary judgment for the respondent state officials on May 28, 1975, holding the state taxes not barred by the federal law principles invoked by the Tribe and Pinetop. (App. at 19a-20a) The case then went to trial on a purely

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4/ Through some inadvertence the First Amended Complaint was not file-stamped by the Clerk of the Superior Court. The Answers to the First Amended Complaint were filed February 26, 1974.

5/ The First Amended Complaint also joined as additional defendants the Arizona Corporation Commission and its members and the Governor and the Attorney General. It further sought relief against the new defendants prohibiting them from attempting to regulate the relationship between the Tribe and Pinetop as a "contract motor carrier of property" under the provisions of Ariz. Rev. Stat. Secs. 40-601 et seq. (1974). After the filing of Appellants' Opening Brief in the Arizona Court of Appeals, those defendants agreed they would not attempt to regulate Pinetop, so they were dismissed from this litigation. This case has since proceeded against only the present respondents, who are the state officials charged with enforcing the challenged taxes.

state-law question over the manner of calculating the motor carrier license taxes due, which was resolved against Pinetop by a final judgment entered September 7, 1976. (App. at 21a-23a)

The federal questions were squarely presented again in the Arizona Court of Appeals and were completely rejected there. That court did uphold Pinetop's state-law claim under stipulated facts to a partial refund (60%) of the motor carrier license taxes paid under protest and remanded for a computation of the partial refund due. (App. at 32a-33a) The Arizona Supreme Court on October 4, 1978 declined to grant review.[6/]

6/ Parallel litigation is also pending in the U.S. District Court for the District of Arizona, No. CIV-73-788 PTC WEC. When the State first claimed taxes from Pinetop in late 1971, it was informally agreed that future disputed taxes would be paid under protest as they accrued, which has been done since November, 1971. The State also threatened to collect some $30,000 said to be due for the periods between 1969 and November 1971. Since payment of this sum would have crippled Pinetop, the parties also informally agreed that collection of this $30,000 would be postponed until conclusion of this tax refund litigation.

In late 1973 the State determined to abandon this agreement and threatened to execute immediately on
(continued on next page)

ARGUMENT

I. COMPREHENSIVE FEDERAL REGULATION OF INDIAN TIMBER PREEMPTS THESE STATE GROSS RECEIPTS AND MOTOR FUEL TAXES ON AGENTS OF A TRIBAL TIMBER ENTERPRISE.

A. The federal preemption question has great importance to many Indian tribes possessing commercial timber resources and has not been resolved by this Court.

This is the first case to reach this Court on whether and to what extent comprehensive federal regulation

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(continued)
Pinetop's equipment to collect the $30,000. Since the Arizona courts have no power to enjoin collection of these taxes (Ariz. Rev. Stat. Sec. 40-648(A) (1974) and Sec. 28-1585(A) (1976)), the Tribe and Pinetop sued the same defendants in federal court on December 12, 1973 to enjoin collection of the taxes for the periods from 1969 to November, 1971. A temporary restraining order was granted on December 13, 1973. At a hearing on January 14, 1974, the District Court determined to stay the federal action on the condition that the state officials consent to a continuation of the temporary restraining order at least until conclusion of the state court action. The state officials accepted the District Court's offer, the restraining order was continued (later modified to a consent preliminary injunction on February 3, 1976), and no further action has been taken by the District Court.

The federal litigation concerns asserted tax liabilities for a different time period from those at issue in this case. Even if the same tax periods were involved, the state proceeding below was wholly independent of the federal action, and the questions presented by this petition were fully litigated in the Arizona Court of Appeals. The finality of the decision below for purposes of this petition is therefore unaffected by the federal action. Cf. NAACP v. Button, 371 U.S. 415, 427-28 (1963).

of Indian timber preempts state laws reaching the same subject matter.7/ Specifically, this Court has not ruled on whether such federal regulation preempts the states from draining tax revenues from on-reservation tribal timber enterprises because of the fortuity that an agent of such an enterprise is non-Indian.

The question of the preemptive effect of federal regulation of Indian timber is one of great importance throughout Indian Country. The Final Report of the American Indian Policy Review Commission (1977), a two-year Congressional study, summarizes the importance of timber resources to many Indian peoples:

> "Timber has the potential for being one of the most important Indian resources for development of reservation economies." Id. at 324

7/ One federal district court has ruled that federal Indian timber regulation preempts application of all state commercial law to timber contracts between tribes and lumber companies. Rather, such contracts are to be enforced according to federal common law principles of contract law. In re Humboldt Fir, Inc., 426 F.Supp. 292 (N.D. Cal. 1977). That is a far more expansive preemption of state law than the tax preemption claimed in this case, and it is plainly in conflict with the analysis and holding of the Arizona Court of Appeals.

> "The economic potential of Indian timber resources is very encouraging. Indeed, it is estimated that tribes possessed of medium to large stands of timber have the capacity to achieve economic self-sufficiency based on their timber resources alone for, as cannot be overemphasized, timber is a renewable resource. With proper management and with the development of related industry, it can supply an economic base for certain tribes for the indefinite future." Id. at 327.

The Final Report also shows the quantitative importance of timber resources to many tribes:

> "One-fourth of all Indian lands are forested, and 10 percent of all Indian lands are commercial forest lands. Timber contributes from 25 to 100 percent of tribal revenues for 57 reservations; more than 80 percent on 11 of these reservations. . . ." Id. at 324.

However, the Congressional commission also concludes that the potential benefits from timber have not been achieved, in large part because of the BIA's lack of success at comprehensive planning and management. Id. at 324-28.

If the historic cycle of Indian poverty and reliance upon federal welfare programs is ever to be broken, it can only be done by the development of reservation-based economies. Without on-reservation employment, Indian peoples must continue to choose between poverty or abandonment of their reservation homes and cultures.

The Congress has identified Indian timber development as an especially promising way to end that dilemma.

As tribes increase their development of timber, other states following the lead of Arizona will surely attempt to drain revenues off the reservation by taxing incidents of tribal timber enterprises. This Court should grant certiorari in this case to resolve for the benefit of the 57 tribes with commercial timber resources the important federal preemption question here presented. Indeed, until this Court speaks, uncertainty about the preemption question will itself hinder sound planning for Indian timber development.

B. The lower court erred in rejecting the Tribe's claim of federal preemption.

The leading case on implied federal preemption of state taxation of non-Indians doing business on Indian reservations is Warren Trading Post Co. v. Arizona State Tax Commission, 380 U.S. 685 (1965).

Warren Trading Post held that Arizona could not impose its transaction privilege (gross receipts) tax on a non-Indian reservation trader selling to Indians. Congress had long regulated trade and commerce with the Indian tribes and had delegated to federal officials

the exclusive power to license traders. Acting under the authority of statutes enacted in 1876 and 1901, the Commissioner of Indian Affairs had promulgated detailed regulations (25 C.F.R. Secs. 251, 252) governing traders. The regulations required detailed business records, which may be inspected "to make sure that prices charged are fair and reasonable."

In light of this history of comprehensive regulation, this Court concluded that Congress intended "that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by acts of Congress or by valid regulations promulgated under those acts." 380 U.S. at 691

Arizona's gross receipts tax was held preempted by this comprehensive regulation, even though not expressly prohibited by it, because "this State tax on gross income would put financial burdens on appellant or the Indians with whom it deals in addition to those Congress or the Tribes have proscribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner." Id. at 691

The lower courts have applied the Warren Trading Post preemption doctrine in other areas as well.[8/]

In finding federal preemption of the state tax in Warren Trading Post, this Court focused on two factors: (1) the comprehensive scope of federal regulation of Indian traders and (2) a specific federal concern with the economics of the regulated activity (i.e., a concern that prices be fair and reasonable to Indians) which state taxation could touch upon. The management, harvesting and marketing of Indian reservation timber is likewise the subject of comprehensive federal regulation and of a specific federal concern with its economic impact upon Indian people.

Indian reservation timber is owned by the United States for the benefit of the Indian tribes and may not be harvested for sale even by the tribe itself without

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8/ Confederated Tribes of the Colville Indian Reservation v. Washington, 446 F.Supp. 1339 (E.D. Wash. 1978) (three-judge court) (state tax on non-Indian purchases of cigarettes preempted by tribal tax); Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 658 & n. 2 (9th Cir. 1975) (all state regulation over Indian use or governance of reservation lands ousted); Confederated Tribes of the Colville Indian Reservation v. State of Washington, 412 F.Supp. 651, 656 (E.D. Wash. 1976) (state licensing of non-Indian fishing on the reservation is preempted in favor of tribe).

the explicit permission of the United States.[9/] A treatise on Indian law frequently cited by this Court states, "Congress has repeatedly enacted special legislation authorizing disposition of timber on various designated reservations, providing always that the proceeds of such disposition should accrue to the benefit of the tribe concerned." U.S. Dept. of Interior, Federal Indian Law 657 (1958).

Congress has also enacted various laws of general application relating to tribal timber. Among the earliest is an act of 1889, now codified as 25 U.S.C. Sec. 196 (1976), which authorizes the removal and sale of dead timber on Indian lands. In 1910 Congress allowed the sale of living as well as dead timber "under regulations to be proscribed by the Secretary of the Interior" on unalloted reservation lands, 25 U.S.C. Sec. 407 (1976), as well as on allotments with the consent of the Secretary. 25 U.S.C. Sec. 406 (1976). In 1964 Congress updated Sec. 407 to specifically

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9/ Pine River Logging & Improvement Co. v. United States, 186 U.S. 279 (1902); United States v. Cook, 86 U.S. (19 Wall.) 591 (1874); and authorities cited at 6, footnote 2, supra.

provide that Indian timber "may be sold in accordance with the principles of sustained yield, or in order to convert the land to a more desirable use." The House Committee Report on this amendment evidences a federal concern with all aspects of Indian forest management and harvesting:

> "In enacting S. 1565 the Committee wishes it to be clearly understood modern means of reforestation practices as well as harvesting operations will be pursued in the implementation of the legislation." H. Rep. No. 1292, 88th Cong., 2nd Sess. (1964); 1964 U.S. Code Cong. and Adm. News 2162.

Some of the regulations issued pursuant to these statutes are published in the Code of Federal Regulations, 25 C.F.R. Secs. 141 and 142 (1978). The objectives of the regulations, stated in 25 C.F.R. Sec. 141.3 (1978), are notable for their comprehensiveness and their sole concern with maximizing the environmental, economic, employment, recreational and esthetic values of the forest for Indian peoples. Strikingly absent from the regulations are any provisions for the dedication of tribal forest resources to the building and maintaining of state highways off the reservation.

The BIA is also required to prepare comprehensive "management plans for the forest resource" for major Indian forests. 25 C.F.R. Sec. 141.4 (1978) The Bureau of Indian Affairs closely supervises all of the timber harvesting activities of FATCO and its logging contractors, such as Pinetop, as is summarized at pp. 5-8, supra.

The question under Warren Trading Post Co. then becomes whether there is room within this comprehensive scheme of federal regulation for also imposing the State's revenue raising purposes on Pinetop's activities -- and therefore on the tribal timber operation itself.

As has been stated, the State's use fuel and motor carrier license taxes are intended to raise revenues to support State highways. But the federal scheme of Indian timber management and harvesting is specifically concerned with the economics of Indian timber activity and with its financial consequences to the Indian beneficiaries. Like the gross receipts tax struck down in Warren Trading Post, Arizona's attempt to tax Indian timber activities will "disturb and disarrange the statutory plan Congress set up in order to protect the

Indians," in this case in their use and development of their timber resources.

The federal statutes and regulations dealing with Indian timber management are permeated with concern over the financial aspects of timber management and harvesting. The regulations explicitly state that the ultimate profit from timber activities should accrue to the Indians (25 C.F.R. Sec. 141.3(3)) and no mention is made of also meeting the financial needs of state governments for services they provide off the reservation.10/

The regulations also explicitly identify Indian employment as a major objective of the utilization of tribal timber (25 C.F.R. Sec. 141.3(3)), as have the earliest timber regulations dating from the Nineteenth Century. Cf. Pine River Logging & Improvement Co. v. United States, 186 U.S. 279 (1902). If Indian timber enterprises are saddled with additional costs (such as state taxes), their marginal profitability will be

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10/ This Court has also protected owners of timber on alloted lands from the financial demands of the federal government, holding federal income taxation on the sale of such timber to be a "charge or encumbrance" prohibited by the General Allotment Act of 1887. Squire v. Capoeman, 351 U.S. 1 (1956).

reduced and less timber activity will be economically feasible, resulting in fewer jobs for Indians. Congress has shown no intention of charging Indian timber enterprises with the building of off-reservation state highways at the expense of sacrificing Indian jobs, and such an additional purpose would necessarily frustrate some or all of the federal purposes enumerated in 25 C.F.R. Sec. 141.3.

Indeed, where there is a choice between maximizing economic benefits and pursuing other values in timber enterprises, the regulations themselves expressly state the other values to be sought: "the recreational or aesthetic value of the forest to the Indians" (25 C.F.R. Sec. 141.3(5)) and "the preservation and development of grazing, wildlife and other values of the forest to the extent that such action is in the best interest of the Indians." 25 C.F.R. Sec. 141.3(7) (emphasis supplied)

Warren Trading Post struck down a tax applied to a reservation trader because the additional economic burden imposed by such a tax "could" bear upon the prices of products sold to reservation Indians and

because the federal regulations showed a specific concern with the fairness and reasonableness of those prices. In this case, the United States has shown an even more pervasive concern with the economic viability of Indian timber enterprises and the economic consequences of such enterprises for Indian people. There is even less room here for the State to impose economic burdens on Indian timber enterprises unrelated to their stated federal objectives.

II. THE ARIZONA ENABLING ACT EXPRESSLY DEPRIVES ARIZONA OF REGULATORY JURISDICTION OVER INDIAN RESERVATION TRUST LANDS, WHICH INCLUDES THE POWER TO TAX THE USE OF TRIBALLY OWNED ROADS BY AGENTS OF THE TRIBE.

In the Arizona Enabling Act, 36 Stat. 557, 569 Sec. 20 (App. at 43a-44a), Congress expressly deprived the State of Arizona of regulatory jurisdiction over Indian reservation trust land itself. The Enabling Act contains two distinct provisions. First is a disclaimer of "all right and title" to Indian lands, and second is a disclaimer of "absolute jurisdiction and control" of Indian lands until the Indian titles thereto shall have been extinguished. The second deprives Arizona of regulatory jurisdiction over Indian land itself.

As applied in this case, the Arizona motor carrier license tax is a tax on agents of the Tribe for using Indian reservation roads (not owned, built, or maintained by the State) to haul tribal timber for the Tribe. The Arizona use fuel tax is a tax on the consumption of motor fuel consumed in the use of tribal roads.

The opinion of the lower court refuses to interpret the Arizona Enabling Act as depriving Arizona of power to regulate (i.e., tax) the use of reservation trust lands. Rather, the Arizona court, without even discussing the disclaimer of "absolute jurisdiction and control," notes that the Enabling Act also contains a disclaimer of "all right and title." It then holds that the only significance of the entire Enabling Act is as a disclaimer of property interest. 585 P.2d at 895-96, App. at 28a-29a

This holding is in plain conflict with the decisions of this Court. Nine western states[11/] admitted between

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11/ Arizona, Idaho, Montana, New Mexico, North Dakota, South Dakota, Utah, Washington and Wyoming. Related but quite dissimilar provisions are present in the Oklahoma and Alaska enabling acts.

1889 and 1912 have enabling act or constitutional disclaimers of "absolute jurisdiction or control" over Indian tribal lands. Such a disclaimer first appears in the North Dakota, South Dakota, Montana, and Washington enabling act, 25 Stat. 676 (1889), which provided that "said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . ." 25 Stat. at 677. The legislative history of this act makes clear that Congress originally intended this language to render Indian reservation land entirely extraterritorial to the State. H. Rep. No. 1025, 50th Cong., 1st Sess., 8, 9 (1888) (to accompany HR 8466)

When this statutory language was first presented to the Supreme Court in Draper v. United States, 164 U.S. 240 (1896), the unequivocal legislative history was not brought to the Court's attention, and this Court declined to interpret the language as making Indian reservations completely extraterritorial to the State. However, the Court did hold such language to deprive states of regulatory authority over reservation trust land itself. After discussing the General Allotment Act of 1887 under which land allotments subject to

restrictions on alienation were made to individual Indians, the Court held that the enabling act disclaimer was intended "to prevent any implication of the power of the state to frustrate the limitations imposed by the laws of the United States upon the title of lands once in an Indian reservation, but which had become extinct by allotment and severalty." Id. at 247

Over the years this Court has repeatedly held that such enabling act disclaimers deprive states not only of property interest in Indian lands but also of governmental authority at least in some respects.12/ Most recently this Court stated in considered dictum that the Arizona Enabling Act prevents the State from taxing the income of reservation Indians. McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 175-76 (1973).

12/ Several cases cite such enabling act disclaimers in the context of state criminal jurisdiction on Indian reservations. Williams v. United States, 327 U.S. 711, 714 n. 10 (1946); United States v. Chavez, 290 U.S. 357, 360 (1933); Donnelly v. United States, 228 U.S. 243, 271-72 (1913); United States v. Sutton, 215 U.S. 291, 335-36 (1909). Compare, Organized Village of Kake v. Egan, 369 U.S. 60 (1962), which upheld state regulatory power over Indian property not on a reservation, as is explained in McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 175 n. 15 (1973).

The lower court refused to acknowledge any relationship between these taxes and the use of Indian land. 585 P.2d at 896, App. at 29a. We submit the nexus is present to anyone willing to see it. A tax on tribal agents for the privilege of using tribal roads on the tribe's own business is plainly an assertion of power over the use of that portion of the tribe's land which is roadway. In any event, the characterization of these state taxes for purposes of their impact on superior doctrines of federal law is itself a question of federal law. First Agricultural National Bank v. State Tax Commission, 392 U.S. 339, 346-47 (1968). Both taxes as applied here plainly regulate and burden the use of tribal roads in violation of the Arizona Enabling Act.13/

13/ The Arizona interpretation of its Enabling Act is in conflict with the interpretation given by other state courts to identical or similar enabling act provisions. Smith v. Temple, 82 S.D. 650, 652, 152 N.W.2d 547, 548 (1967); Peano v. Brennan, 20 S.D. 342, 346-47, 106 N.W. 409, 411 (1906); Makah Indian Tribe v. Callam County, 73 Wash. 2d 677, 440 P.2d 442 (1968); State ex rel. Adams v. Superior Court, 57 Wash. 2d 181, 188, 356 P.2d 985, 990 (1960). Several other state courts originally interpreted their enabling acts contrary to the Arizona courts' views but have more recently overruled their prior cases and come in line
(continued on following page)

III. REGULATIONS OF THE SECRETARY OF THE INTERIOR (25 C.F.R. SEC. 1.4) PRECLUDE THE STATES FROM TAXING AGENTS OF AN INDIAN TRIBE FOR USING TRIBAL ROADS TO HAUL TRIBAL PROPERTY FOR A TRIBE.

As applied here, the Arizona motor carrier license tax and use fuel tax are also prohibited by 25 C.F.R. Sec. 1.4 (1978). (App. at 44a-45a) Both taxes are "laws . . . governing, regulating or controlling the use or development of . . . real or personal property" since they impose conditions upon the use of tribal highways and of tribal timber. Specifically, they condition the use of tribal lands and they in substance condition the hauling of tribally-owned timber on tribal highways upon the payment of taxes to the State.

(continued)
with the Arizona interpretation. Compare Vermillion v. Spotted Elk, 85 N.W.2d 432 (N.D. 1957), with State ex rel. Tompton v. Denoyer, 6 N.D. 586, 72 N.W. 1014 (1897); compare State ex rel. Iron Bear v. District Court, 162 Mont. 335, 512 P.2d 1292 (1973), and State ex rel. McDonald v. District Court, 159 Mont. 156, 496 P.2d 78 (1972), with Crow Tribe of Indians v. Deernose, 158 Mont. 25, 487 P.2d 1133, 1135-36 (1971); compare Sangre de Cristo Development Corp. v. City of Santa Fe, 84 N.M. 343, 350, 503 P.2d 323, 330 (1972), and Montoya v. Bolack, 70 N.M. 196, 372 P.2d 387 (1962), with Your Food Stores, Inc. v. Village of Espanola, 68 N.M. 327, 330, 361 P.2d 950, 953 (1961).

Notwithstanding the apparent literal application of the regulation to this case, the lower court -- without any textual support from the regulation itself -- construed it to prohibit only the application of state laws to Indian property. Thus, the section was held not to bar state regulation of a non-Indian's use of tribal real and personal property. 585 P.2d at 896-97, App. at 29a-30a

Despite the lower court's reading, the regulation itself plainly prohibits application of state laws "governing, regulating or controlling the use or development of any real or personal property . . . held or used under agreement with . . . any . . . Indian Tribe."

The other lower courts to consider the question have held 25 C.F.R. Sec. 1.4 to prohibit state regulation of the use of tribal property, even by a non-Indian.14/

14/ Sangre de Christo Development Corp. Inc. v. City of Santa Fe, 84 N.M. 343, 503 P.2d 232, 331 (1972) (state subdivision regulation of land leased to and used by non-Indians is prohibited); Norvell v. Sangre de Christo Development Co. Inc., 372 F.Supp. 348 (D.N.M. 1974) rev'd on other grounds 519 F.2d 370 (10th Cir. 1975) (same; but also holding the regulation invalid); Parking Drilling Co. v. Metlakatla Indian Community, 451 F.Supp. 1127 (D. Alaska 1978) (Sec. 1.4 prevents application of state tort law of owners and possessors of land to a corporation, otherwise subject to state law, operating an airport leased from a tribe).

Furthermore, the Arizona court's holding that any de facto state regulation of use and development of tribal property is permissible under Section 1.4, provided the incidence of the regulation is upon a non-Indian, reduces that regulation to a nullity. If the regulation merely means that states may not regulate Indians on their reservations, it adds nothing to what would otherwise be the law. Cf. McClanahan v. Arizona State Tax Commission, supra.

The plain purpose of 25 C.F.R. Sec. 1.4 is to leave the control of reservation development of tribal trust property in the hands of the Tribe and the Federal Government, a purpose which must fail if states are allowed to tax and regulate the tribe's own use and development of its property through its non-Indian agents.

The decision of the Arizona Court of Appeals flies in the face of the plain meaning of 25 C.F.R. Sec. 1.4, defeats its purpose, and conflicts with the uniform lower court interpretation of the regulation. This Court should summarily reverse the lower court's interpretation of the regulation. In the alternative, plenary

review should be granted to allow fuller discussion of the true effect of this comprehensive federal regulation concerning authority to regulate economic development of Indian trust property.

IV. THE STATE TAXES IMPERMISSIBLY INFRINGE ON TRIBAL GOVERNMENT.

Even in the absence of federal treaties, statutes, or regulations on point, state jurisdiction over the affairs of non-Indians on reservations is still barred if the exercise of such authority would infringe on the self-government of reservation Indians. Williams v. Lee, 358 U.S. 218, 220 (1959). Even though the state may otherwise have legitimate interests in regulating the non-Indian's affairs, that state interest may be pursued only "up to the point where tribal self-government would be affected." McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 179 (1973). The rule, then, is that protection of tribal power of self-government is the preferred value when tribal and state interests clash.

The court below acknowledged the specific impairments of governmental freedom claimed here by the White Mountain Apache Tribe:

"Pinetop argues that these taxes cause interference in the following areas:

"1. With tribal judgments about who may use tribal roads.

"2. With control of its timber resources by conditioning non-Indian use upon payment of taxes to the state.

"3. With tribal choice of the means of managing and harvesting lumber.

"4. With the planning and scope of reservation economic development.

"5. With the tribe's building of passable roads.

"6. With the tribe's ability to tax the same activities." 585 P.2d at 898-99; App. at 31a-32a

These infringements frustrate specific powers of the Tribe confirmed in its constitution (App. at 55a-59a) as adopted pursuant to 25 U.S.C. Sec. 476 (1976) and approved by the Secretary of the Interior. However, the lower court found these infringements insufficient because, in its view, they would not bring the tribal timber enterprise "to its knees." The Arizona court would allow all manner of state interference with tribal governmental freedom up to the point where the tribe is destroyed. But the standard under McClanahan and Williams v. Lee is whether state regulation "infringes"

or "affects" tribal government, not whether it "brings it to its knees." The doctrine against infringement of tribal government is meant to protect Indian governments from illness as well as from funerals.

The Arizona court's disregard of the Williams v. Lee infringement doctrine is also in conflict with other decisions recognizing that in some circumstances state taxation of non-Indians can impermissibly infringe on tribal government.15/

The rule against infringement of tribal government has been increasingly litigated in recent years, and many of the lower courts have failed to give the doctrine its intended scope for the protection of Indian sovereignty.16/

15/ Confederated Tribes of the Colville Indian Reservation v. Washington, supra, at 19 n. 8; Eastern Navajo Industries, Inc. v. Bureau of Revenue, 84 N.M. 369, 552 P.2d 805 (N.M. App. 1976) (state gross receipts tax on state-chartered corporation, which is otherwise plainly subject to state law, infringes in tribal government since its revenues are derived from on-reservation business with an Indian tribe) (alternative holding).

16/ A Congressional member of the American Indian Policy Review Commission, which studied federal Indian law and policy for two years, concluded, "The lower court decisions applying this test are utterly irreconcilable." I Final Report of the American Indian Policy Review Commission 591 (1977) (Separate dissenting views of Cong. Lloyd Meeds, Vice-Chairman).

This decision by the Arizona Court of Appeals is uncommonly perverse in its misuse of the infringement doctrine. It presents an appropriate occasion for this Court to give the lower courts further guidance in the proper application of that doctrine.

CONCLUSION

The State of Arizona claims the right to tax the use of on-reservation tribally-owned roads by agents of the Tribe conducting the Tribe's own business. Not one penny of the revenues thus received by the State is used to build or maintain the roads the use of which is said to occasion these taxes.

This most recent of many attempts by Arizona to tax Indians and Indian tribes in substance runs afoul of specific statutes and regulations, of preemptive federal regulation of tribal timber management and harvesting, and of general federal principles limiting the powers of states within Indian country.

Historic and comprehensive federal regulation of Indian timber leaves no room for the state to impose additional financial burdens on tribal timber enterprises which could disburb and disarrange the statutory plan

Congress set up in order to protect Indians in their enjoyment of the benefits to be derived from tribal timber.

Congress specifically deprived the State of Arizona of power to regulate Indian trust lands, which include tribal roads, in Sec. 20 of the Arizona Enabling Act.

The Secretary of the Interior has further promulgated a regulation (25 C.F.R. Sec. 1.4) which specifically deprives states of authority to regulate the use and development on the reservation of tribal trust property, even by non-Indians. The Arizona taxes violate this express federal recognition that tribes and the Federal Government have exclusive authority, absent other express grants of jurisdiction to the states, over economic development of trust property.

Finally, even apart from the particular federal statutes and regulations, the state taxes as applied here infringe on tribal government in violation of the doctrine of Williams v. Lee and McClanahan v. Arizona State Tax Commission.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Neil Vincent Wake
Leo R. Beus
JENNINGS, STROUSS & SALMON
111 West Monroe
Phoenix, Arizona 85003
Attorneys for Petitioners

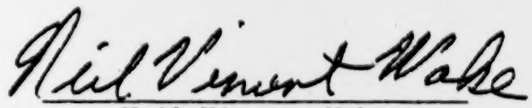
December 1978

CERTIFICATE OF SERVICE

I am one of the attorneys for the Petitioners and am a member of the bar of this Court. I hereby certify that I caused three copies of the foregoing Petition for Writ of Ceriorari to be hand delivered on December 27, 1978, to:

John A. LaSota, Jr.
The Attorney General
Donald O. Loeb
Special Assistant Attorney General
Paul S. Harter
Assistant Attorney General
State Capital
1700 West Washington
Phoenix, Arizona 85007
Attorneys for Respondents

All parties required to be served have been served.



Neil Vincent Wake

APPENDIX A

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

WHITE MOUNTAIN APACHE TRIBE, an Indian tribe established pursuant to Executive Order; E. H. LOVENESS LUMBER SALES CO., an Oregon corporation dba PINETOP LOGGING COMPANY, qualified to do business in the State of Arizona; BASIN BUILDING MATERIALS COMPANY, an Oregon corporation dba PINETOP LOGGING COMPANY, qualified to do business in the State of Arizona,	)	No. C256110
Plaintiffs,	)	FIRST
vs.	)	AMENDED
JACK WILLIAMS, Governor of the State of Arizona; GARY K. NELSON, Attorney General for the State of Arizona; LEW DAVIS, Chairman of the Arizona Highway Commission; RUDY E. CAMPBELL, Vice Chairman of the Arizona Highway Commission; WALTER W. SURRETT, Member of the Arizona Highway Commission; LEN W. MATTICE, Member of the Arizona Highway Commission; JUSTIN HERMAN, Arizona State Highway Director; DAVID H. CAMPBELL, Superintendent of the Motor Vehicle Division, Arizona Highway Commission; ARIZONA	)	COMPLAINT
	)	[Filed February 1974]

CORPORATION COMMISSION; AL FARON, CHARLES GARLAND and ERNEST GARFIELD, Commissioners of the Arizona Commission,	)
Defendants.	)

For plaintiffs' cause of action, they state:

I

This action is brought pursuant to the Fourteenth Amendment of the Constitution of the United States, and the Supremacy Clause, Article VI of the Constitution of the United States, and federal statutes and regulations enacted and promulgated pursuant thereto; and the Commerce Clause, Article 1, Section 8 of the Constitution of the United States giving Congress the power to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes; and Arizona Revised Statutes 28-1585, payment of use fuel tax paid under protest according to the attached Schedule "A"; and A.R.S. 40-461 payment of the contract motor carrier tax paid under protest according to the attached Schedule "B".

II

Plaintiff, E. H. Loveness Lumber Sales Co. is a corporation incorporated under the laws of the State of Oregon, and is a corporation qualified to do business in the State of Arizona, with its principal place of business in the State of Oregon; Basin Building Materials Company is a corporation incorporated under the laws cf the State of Oregon,

and is a corporation qualified to do business in the State of Arizona, with its principal place of business in the State of Oregon, and is the successor in interest of E. H. Loveness Lumber Sales Co. Both companies are referred to hereinafter as Pinetop.

III

By Executive Order signed by President Grant, dated November 8, 1971 [sic], the Ft. Apache Indian Reservation was established by Act of Congress of June 7, 1897, the Ft. Apache and San Carlos Indian Reservations, which were established by Executive Order signed by President Grant on November 9, 1871, were divided and the White Mountain Indian Reservation was established separately.

IV

Defendant Gary K. Nelson, is the Attorney General of the State of Arizona. Defendant, Jack Williams, is the Governor of the State of Arizona and as Governor is responsible for the actual execution of Arizona's laws under the Arizona Constitution, Article V, Section 4. Defendant, Gary K. Nelson, as Attorney General for the State of Arizona, serves as the state's chief legal counsel pursuant to A.R.S. Sec. 41-192. All other defendants are state officials within the meaning of 28 U.S.C. 2281 and Spielson Motor Sales Co., Inc. v. Dodge, 295 U.S. 89, 55 S.Ct. 678, 79 L.Ed. 1322 (1935). The Constitutional problems posed by the taxes referred to herein are also posed by parallel situations on other reservations in the State of Arizona.

V

The statutes involved in this Complaint are Arizona Revised Statutes, Title 40, Chapter 3, and Arizona Revised Statutes, Title 28, Chapter 9. These statutes of the State of Arizona embody matters of state-wide concern that are enforceable and have been enforced by the State of Arizona, its agencies and its subdivisions throughout the State.

VI

The White Mountain Apache Tribe operates on an annual Balance Budget of approximately $1,522,000.00, of which over 80% of said budget comes from profits on its forestry operations.

VII

The forestry operations of the tribe are run by the Ft. Apache Timber Company, a wholly owned business of the White Mountain Apache Indian Tribe. The timber company is responsible for the tribe's timber harvesting and lumber and wood products manufacturing operations on the reservation. All of the timber used at the timber company sawmill located on the reservation near Whiteriver, Arizona, comes from land and timber owned by the Tribe. The lumbering operation is the Tribe's principal industrial activity and provides a substantial portion of the revenues and employment for the tribe and its members.

VIII

The operation of a sawmill and related wood products manufacturing and remanufacturing consists of many activities, including the cutting, skidding,

loading, hauling, sawing and chipping of pulpwood and sawlog timber.

IX

There are two alternative means by which entities engaged in sawmill operations accomplish the harvesting and delivery of their timber to the sawmill. Some do their own "logging" while others, in order to save the very substantial investment necessary to a logging operation, contract that operation to an independent contractor.

X

The plaintiff, White Mountain Apache Tribe, has elected to contract its logging operations to the plaintiff Pinetop. Pinetop is compensated according to an agreed-upon scale for every thousand board feet of timber taken from the Tribe's timberlands and delivered to the sawmill near Whiteriver. The major portion of Pinetop's responsibility in fulfilling its contract with the Indians consists of cutting, skidding, trimming, loading and unloading the timber. The hauling is a necessary incidental activity to the operation of Pinetop. Approximately 60% of the timber which is transported is consumed in the manufacture of pulpwood or paper within the State of Arizona.

XI

Pinetop carries on no other activity in the State of Arizona outside of logging operation with the Ft. Apache Timber Co.

XII

The entire logging operation from the tree to the sawmill, occurs exclusively upon and with the White Mountain Apache Indian Reservation and constitutes commerce with an Indian Tribe.

XIII

There are four categories of roads in the Ft. Apache Indian Reservation which are used by the Plaintiffs in their logging operations: (1) tribal roads financed and maintained by the Indians exclusively; (2) federally funded (Bureau of Indian Affairs) roads serving recreational public needs; (3) state highways; and (4) logging roads built and maintained by loggers. In transporting timber from the woods to the sawmill, plaintiffs' vehicles travel substantially over tribal and BIA roads, although short portions of many of the trips are on state highways.

The only category of roads on the Fort Apache Indian Reservation which are built or maintained by the State of Arizona, is category (3), state highways. Categories (1), (2) and (4) are financed and maintained by sources other than monies from the State of Arizona. Tribal, BIA and logging roads are not public highways within the meaning of Arizona Revised Statutes Sec. 40-601.9, and thus any use fuel and license motor carrier taxes on these roads are inappropriate.

XIV

The State of Arizona, acting through the defendants, officials of the Arizona Highway Department, have assessed against Pinetop applicable to its logging operations on the Reservation, a use fuel tax and penalty pursuant to A.R.S. Sec.

28-1552, 28-1573, 28-1575 & 28-1576, and a motor carrier license tax and penalty pursuant to A.R.S. Sec. 40-641 and 40-646.

XV

The State of Arizona has also advised plaintiffs that pursuant to A.R.S. Sec. 40-607 and/or A.R.S. Sec. 40-609 a Certificate of Public Convenience and Necessity must be obtained from the Arizona Corporation Commission of the State of Arizona in order to continue its present logging operations. In order to obtain a Certificate of Public Convenience and Necessity, Pinetop must apply therefore to the Arizona Corporation Commission giving the Arizona Corporation Commission the following information:

1. The name and address of applicant, and the names and addresses of its officers, if any.

2. The principal place of business of applicant.

3. The public highways over which, and the fixed termini or regular route, if any, between or over which applicant desires to operate.

4. The kind of transportation, whether for property or passengers, together with the description and character of the vehicles which applicant proposes to use, including the seating capacity thereof, if for passenger transportation, or the tonnage thereof, if for property transportation.

5. The proposed time schedule, and a schedule of tariffs showing the fares or rates to be charged between the points to be served.

6. Such other information as the Commission prescribes. A hearing is then held, and the Commission can then, pursuant to its own terms, conditions, rules and regulations, issue a permit. The regulation thereafter by the Commission is extensive and would, if imposed on the plaintiffs, cause substantial interference and cost to plaintiffs. Said cost and interference would constitute a burden on commerce between and among plaintiff Pinetop and plaintiff Indians.

Failure to obtain said certificate or the failure to comply with any of the Commission's regulations constitutes a crime under Arizona law punishable by a substantial fine and imprisonment not to exceed one year. A.R.S. Sec. 40-660.

XVI

The use fuel tax is "an excise tax . . . imposed at the rate of seven cents per gallon upon use fuel used in the propulsion of a motor vehicle on any highway within [the] state. . . ;" A.R.S. Sec. 28-1552, and the motor carrier license tax is "a license tax of two and one-half percent of the gross receipts from the carrier's operations within the state for the preceding calendar month, excluding receipts from property transported under a star route contract with the federal government." A.R.S. Sec. 40-641.

XVII

Neither of these taxes is apportioned according to usage over state highways located on the reservation. As to the use fuel taxes, the State of Arizona has attempted to tax all travel that occurs over BIA roads to whose construction,

maintenance and repair the state makes absolutely no contribution.

XVIII

The principal factors taken into account by Pinetop and the Tribe and the timber company in negotiating the per thousand price for the logging operation, is the costs to be incurred by Pinetop in carrying out that operation. While the tax is nominally imposed on Pinetop, it is effectively a tax on the Tribe and the timber company. These unapportioned taxes constitute a significant element of that cost.

XIX

Plaintiffs have voluntarily paid taxes on all fuel consumed on state highways. Plaintiffs dispute the right of the state to extract taxes for the use of logging, Indian and BIA roads where the State of Arizona exercises no authority, and whose construction, maintenance and repair costs, the State of Arizona contributes nothing.

XX

The aforementioned taxes are violative of the due process and equal protection clauses contained in the Fourteenth Amendment, the Commerce Clause, Article I, Section 8, Clause 3 and the Supremacy Clause, Article VI of the Federal Constitution and the due process of equal protection clauses of the State Constitution; the Arizona Enabling Act, Section 20, 36 Stat. 469; Arizona Constitution 20, Article XX Fourth.

XXI

The denial of equal protection results from the state's attempt to impose unapportioned taxes on the plaintiffs' logging operations occurring partly over roads maintained by the State of Arizona, but not on other operations that occur in part over state roads and part over non-state roads. There is no attempt to impose similar unapportioned taxes on carriers that operate partly in the State of Arizona and partly within some other state, and A.R.S. Sec. 40-641 expressly exempts "receipts from property transported under a star route contract of the federal government."

There is no legal basis for the taxation; the taxation is arbitrary and discriminatory, lacking any rational basis.

XXII

The unapportioned application of these taxes to the plaintiffs' operations constitutes a taking in contravention of the Fourteenth Amendment of the United States Constitution as due process is denied.

XXIII

Unapportioned application of these taxes to the plaintiffs' operations is a mere contravention of Congressional authority to regulate commerce with the Indians. Article I, Section 8, Clause 3 of the Constitution gives Congress the exclusive authority to "regulate commerce with foreign nations and among the several states, and with the Indian Tribes."

The imposition of use fuel and motor carrier tax by the State of Arizona and the requirement to obtain a certificate of convenience and necessity impairs the right to regulate Indian commerce reserved to the Congress by the Constitution, as

evidenced by its conflict with Federal regulations.

XXIV

The Tribe originally adopted a Constitution and By-laws in 1938 and in conjunction with the Federal Government has concern of the overall management of the Reservation and all other organizations on the Reservation. Pursuant to 30 Stat. 64 (25 U.S.C. 476) as amended in 1968, Congress has the supreme right to regulate commerce of any tribe although the tribe dwells well within the confines of a state. Pursuant to Title 25 the Congress regulates the usage of all forests on Indian reservations. Extensive rules and regulations have been promulgated by the Bureau of Indian Affairs virtually encompassing all aspects of forest utilization and management. See for example 25 CFR Subchapter M and 36 CFR Part 200-201. Indian commerce is therefore closed to regulation by the State of Arizona because Congress has preempted the field with a comprehensive system of federal law which not only governs every phase of Indian Commerce but specifically rests the sole authority to regulate it to the Commissioner of Indian Affairs.

XXV

The stated objective of the Federal regulations are:

(a) The following objectives are to be sought in the management of unallotted Indian forest lands in accordance with the principles of sustained yield;

(1) The preservation of such lands in a perpetually productive state by providing effective protection, by applying sound silvicultural and economic prin-

ciples to the harvesting of the timber, and by making adequate provision for new forest growth as the timber is removed.

(2) The regulation of the cut in a manner which will insure method and order in harvesting the tree capital, so as to make possible continuous production and perpetual forest business.

(3) The development of Indian forests by the Indian people for the purpose of promoting self-sustaining communities, to the end that the Indians may receive from their own property not only the stumpage value, but also the benefit of whatever profit it is capable of yielding and whatever labor the Indians are qualified to perform.

(4) The sale of Indian timber in open competitive markets in accordance with good business practices on reservations where the volume that should be harvested annually is in excess of that which is being developed by the Indians.

(5) The preservation of the forest in its natural state wherever it is considered, and the authorized Indian representatives agree, that the recreational or aesthetic value of the forest to the Indians exceeds its value for the production of forest products.

(6) The management of the forest in such a manner as to retain its beneficial effects in regulating water run-off and minimizing erosion.

(7) The preservation and development of grazing, wildlife, and other values of the forest to the extent that such action is in the best interest of the Indians.

(b) Similar objectives are sought in the management of allotted Indian forest lands, but, in addition, the sales of timber shall be based upon a consideration of the needs and best interests of the Indian owner and his heirs. The Secretary shall take into consideration, among other things:

(1) The state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs.

(2) The highest and best use of the land, including the adviseability of devoting it to other uses for the benefit of the owner and his heirs.

(3) The present and future financial needs of the owner and his heirs.

The taxes and regulations attempted to be imposed by the State of Arizona are in direct contravention of the stated objectives of Federal regulations.

XXVI

Only by express congressional grant may the State of Arizona diminish the right of Indians to govern themselves. The field of Indian commerce has not been the subject of such grant. Congress has permitted the states to assume concurrent, civil and criminal jurisdiction on Indian Reservations providing the states appropriately amend their Constitutions or Statutes. Act of August 15, 1953 c. 505 Sections 6, 7, 67 Stat. 590. Arizona has expressly disclaimed any such jurisdiction in its enabling Act and Constitution. Arizona Enabling Act, Section 20, 36 Stat. 569; Arizona Constitution, Article XX Fourth. Arizona having not accepted said jurisdiction, Arizona's claim to jurisdiction over commerce with the Indians must fail.

XXVII

The State of Arizona has in its Enabling Act, Section 20, 36 Stat. 569, and in Article XX of its Constitution, forever disclaimed any right or title to the unappropriated and ungranted public lands lying within the boundaries of lands owned or held by any Indian or Indian Tribes. The State has relinquished all jurisdiction over Indian Tribes and Indian commerce in its Constitution by disclaiming right or title to said lands ". . . which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States." Ariticle XX, Arizona Constitution.

XXVIII

This suit is of a civil nature and is brought for the purpose of obtaining a declaratory judgment, that the taxing and regulatory statutes described herein are unreasonable, arbitrary, capricious, discriminatory, unlawful, unconstitutional, void and unenforceable to the extent and insofar as said laws and any of the provisions thereof are interrupted [interpreted], applied, enforced or given effect so as to hinder, interfere, interfere with, impose, prevent, restrain or prohibit plaintiffs in their activities upon the Indian reservation; as well as for the purpose of obtaining an order restraining and enjoining the defendants and each of them, from assessing any further taxes or requiring Pinetop to obtain

a Certificate of Public Convenience and Necessity pursuant to the above named statutes.

XXIX

Arizona Revised Statutes Section 20-1585 and 40-649 both require that no injunction shall issue from any court which presumablyincludes Federal District Court to prevent or enjoin the collection of license or use fuel taxes imposed by the aforementioned statutes. This suit is brought for the purpose of obtaining a declaratory judgment (pursuant to Title 20 U.S.C. Sec. 2201), that such statutory requirements are unreasonable, arbitrary, capricious, discriminatory, unlawful, unconstitutional, void and unenforceable.

XXX

Plaintiffs alternatively plead that 60% of the logs transported by Pinetop are pulpwood logs which are consumed in the manufacture of pulpwood or paper within the State of Arizona. Arizona Revised Statutes Sec. 40-601.8 defines a private motor carrier (thus not subject to a license motor carrier tax) as a person who transports who is engaged in the "transporting of pulpwood logs which are consumed in the manufacture of pulp or paper within the State of Arizona by a person in the business of harvesting such pulpwood logs. . ." Defendants have refused and continued to refuse to reflect a reduction in their audit assessment for the pulpwood logs which are transported by Pinetop.

XXXI

Plaintiff Pinetop has exhausted its administrative remedies and has no

adequate remedy at law, and will be irreparably injured by the wrongful and unlawful acts of defendants, in threatening, ordering, attempting, or acting to enforce the provisions of the aforementioned statutes unless the defendants, and each of them, are restrained and enjoined by this Court from so threatening, ordering, attempting or acting.

WHEREFORE, plaintiffs pray:

1. That a declaratory judgment issue, restraining and enjoining defendants and each of them, and their deputies, agents, servants, employees and attorneys and all persons in active concert and participation with them from, in any manner, either directly or indirectly, threatening, ordering, attempting or acting to hinder, interfere with, impede, restrain, prohibit the relationship or otherwise regulate the relationship between Pinetop and the Tribe.

2. That a declaratory judgment issue declaring that the provisions of the assessment statutes be ruled unconstitutional as they apply to plaintiffs in the instant action and that all payments made by plaintiffs to the State of Arizona be refunded.

3. That a declaratory judgment issue declaring that the provisions of A.R.S. Sec. 28-1553, 28-1573, 28-1575 and 28-1576 not be used to impede, prevent, restrain or prohibit plaintiffs from doing business with each other.

4. That a declaratory judgment issue declaring that the provisions of A.R.S. Sec. 40-607, 40-608 and 40-660 not be used

to impede, prevent, restrain or prohibit plaintiffs from doing business with each other.

6. That a declaratory judgment issue declaring that the provisions of A.R.S. Secs. 20-1585 and 40-648 be ruled unconstitutional.

7. That a declaratory judgment issue declaring that the provisions of the aforementioned statutes not be used to assess, levy, lien or otherwise inhibit the relationship of Pinetop, Tribe or the Ft. Apache Timber Co.

8. For costs incurred and expended herein.

9. For such other and further relief as the Court may deem just and proper in the premises.

CAVNESS, DeROSE, SENNER & ROOD
By William Tifft
JENNINGS, STROUSS & SALMON
By Leo R. Beus

STATE OF ARIZONA)
) ss. AFFIDAVIT
County of Maricopa)

LELAND A. CARPENTER, being first duly sworn upon his oath deposes and says:

That he is the duly authorized and acting Secretary of Basin Building Materials and managing officer of Basin Building Materials dba Pinetop Logging in Arizona; that he has read the foregoing First Amended Complaint and knows the contents thereof; that the facts and

allegations therein contained are true of his own knowledge, except as to those matters said to be upon information and belief, which matters he believes to be true; and that he makes this affidavit on behalf of Basin Building Materials dba Pinetop Logging Co., being thereunto duly authorized.

DATED this 7th day of February, 1974.

Affiant

SUBSCRIBED AND SWORN to before me this 7th day of February, 1974.

s/ Susan T. Harmon
Notary Public

My Commission expires:
10-28-77

APPENDIX B

ARIZONA SUPERIOR COURT

MARICOPA COUNTY

WHITE MOUNTAIN APACHE TRIBE, an Indian tribe established pursuant to Executive Order; et al.	No. C 256110
Plaintiffs,	ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT
vs.	
JACK WILLIAMS, Governor of the State of Arizona; et al.,	[Filed May 28, 1975]
Defendants.	

Cross motions for Partial Summary Judgment having been presented by both the Plaintiffs and Defendants and the Court having heard extended oral arguments thereon, and further having considered the various memoranda and authorities presented by counsel and being fully advised in the premises;

IT IS NOW ORDERED denying Plaintiff's Motion for Partial Summary Judgment;

IT IS FURTHER ORDERED that the Court hereby makes an expressed determination that there is no just reason for delay and therefore expressly directs the entry of an order granting Defendants' Motion for Partial Summary Judgment to the effect that the State of Arizona may validly impose its use fuel and motor carrier

license taxes against the Plaintiff corporation;

IT IS FURTHER ORDERED confirming August 21, 1975 at the hour of 9:30 o'clock A.M. in this Division as the time and place for trial to the Court sitting without a jury on all remaining issues.

DONE IN OPEN COURT this 23rd day of May, 1975.

/s/ Roger G. Strand
Judge of the Superior Court

APPENDIX C

ARIZONA SUPERIOR COURT

MARICOPA COUNTY

WHITE MOUNTAIN APACHE TRIBE, an Indian tribe established pursuant to Executive Order; et al.,	)	No. C256110
Plaintiffs,	)	JUDGMENT
vs.	)	[filed September 7, 1976]
JACK WILLIAMS, Governor of the State of Arizona; et al.,	)	
Defendants.	)	

This matter came on regularly for trial to the Court, sitting without a jury, on April 15, 1976, at the hour of 3:40 o'clock P.M., before the Honorable Rufus C. Coulter, Judge of the Superior Court of Arizona, Division 21, Maricopa County. Plaintiffs were represented by their attorneys LEO R. BEUS and NEIL VINCENT WAKE, and the defendants were represented by their attorney, DONALD O. LOEB, Assistant Attorney General.

By an Order entered May 28, 1975 the Honorable Roger G. Strand granted partial summary judgment in favor of defendants and against plaintiffs determining that the State's levy of its use fuel tax (A.R.S. § 28-1552) and its motor carrier license tax (A.R.S. § 40-641) against plaintiff PINETOP LOGGING COMPANY does

not violate the Constitutions of the United States or of Arizona and is not otherwise contrary to federal law.

The sole issue of fact or law presented to the Court for determination, as set forth in Paragraph 3 of the pretrial statement signed by all parties, is whether or not plaintiff corporations are entitled to the benefit of the pulpwood exemption to the motor carrier license tax contained in A.R.S. § 40-601.A.10. The parties submitted this issue to the Court on a stipulated statement of facts contained in the pretrial statement, an additional stipulation made in open court, one deposition and two exhibits.

Based upon the facts presented to the Court, the Court finds that plaintiff corporations are not entitled to the benefits of the pulpwood exemption.

Based upon the previous Order of Partial Summary Judgment entered on May 28, 1975, and upon the findings and conclusions of this Court,

IT IS THEREFORE ORDERED, ADJUDGED and DECREED:

1. That the plaintiffs are entitled to no refund of the $19,114.59 in use fuel taxes paid by them under protest from November 1971 to date or to be paid in the future.

2. That the plaintiffs are entitled to no refund of the $14,701.42 in motor carrier license taxes paid by them under protest from November 1971 to date or to be paid in the future;

3. That plaintiffs take nothing by way of relief against the defendants, and that the plaintiffs' First Amended Complaint is hereby dismissed with prejudice, each party to bear its own costs.

DONE IN OPEN COURT this 2 day of Sept., 1976.

/s/ Rufus C. Coulter
RUFUS C. COULTER
Judge of the Superior Court
Division 21

Approved as to form:

/s/ Neil Vincent Wake
Neil Vincent Wake

APPENDIX D

[585 P.2d 891]

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

WHITE MOUNTAIN APACHE TRIBE, an Indian tribe established pursuant to Executive Order; E. H. LOVENESS LUMBER SALES CO., an Oregon corporation dba PINETOP LOGGING COMPANY, qualified to do business in the State of Arizona; BASIN BUILDING MATERIALS COMPANY, an Oregon corporation dba PINETOP LOGGING COMPANY, qualified to do business in the State of Arizona, Appellants, v. ROBERT M. BRACKER, Chairman of the Arizona Department of Transportation Board; ARMAND ORTEGA, Vice Chairman of the Arizona Department of Transportation Board; EDWARD J. McCARTHY, RALPH A. WATKINS, JR., JOHN W. McLAUGHLIN, JOHN HOUSTON, WILLIAM A. ERDMANN, ROBERT M. BRACKER and ARMAND ORTEGA, members of the Board, Arizona Department of Transportation; and PHILIP THORNEYCROFT, Assistant Director, Arizona Department of Transportation, Motor Vehicle Division, Appellees.	1 CA-CIV 3226 (Consolidated with No. 1 CA-CIV 3619) DEPARTMENT B O P I N I O N

[585 P.2d 893]

JACOBSON, Judge

This appeal involves the right of the State of Arizona to collect taxes from a non-Indian private carrier on gross receipts derived from its travel over Indian tribal roadways and a diesel fuel "use tax" expended from travel over these same roadways.

Appellants, E. H. Loveness Lumber Sales and Basin Building Materials Company, both Oregon corporations, are authorized to do business in Arizona as Pinetop Logging Company (Pinetop). Pinetop and the White Mountain Apache Tribe[1] brought an action against various officials of the State of Arizona, including the governor, the attorney general, the Arizona Corporation Commission, the Arizona Highway Department and the Arizona Highway Commission, seeking a refund of use fuel taxes and motor carrier license taxes paid under protest by Pinetop and for declaratory relief prohibiting the various defendants from attempting to regulate the relationship between Pinetop and the tribe.[2]

1/ White Mountain Apache Tribe is a nominal party to this action. It has neither paid nor has the State of Arizona attempted to collect any taxes involved in this litigation from the White Mountain Apache Tribe.

2/ Although the pleadings before the trial court and appellants' briefs before this court attempt to raise the issue of state control over tribal relationships, at the time of oral argument it was admitted

The trial court granted the Arizona Highway Commission's motion for partial summary judgment on Pinetop's claim of immunity from the state's use fuel and motor carrier license taxes. The judgment on the partial summary judgment was made appealable and was timely appealed. The

[585 P.2d 894]

only issue remaining for trial was Pinetop's claim that under state law it was partially exempt from the motor carrier license tax due to the so-called "pulpwood exemption" to this tax. This issue proceeded to trial on a detailed stipulation of facts, depositional testimony and exhibits. The trial court entered judgment finding that Pinetop did not qualify for the "pulpwood exemption" and Pinetop likewise appeals from that judgment. By stipulation, these two appeals have been consolidated.

The undisputed facts show that Pinetop has contracted with the Fort Apache Timber Company (FATCO) to sell, load, and transport to the mill, timber growing on the Fort Apache Indian Reservation. FATCO is an economic organization created by the White Mountain Apache Tribe to oversee and control the harvesting and sale of lumber

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that the governor, attorney general and the Arizona Corporation Commission had been dropped from this litigation and the only issues deal with the motor fuel tax and motor carrier tax which the State of Arizona seeks to collect from Pinetop. Thus, the only active appellees are the Arizona Highway Department and the Arizona Highway Commission.

located on that reservation. The timber itself is owned by the United States for the benefit of the tribe and is under the supervision of the Department of the Interior, Bureau of Indian Affairs (B.I.A.), which has in turn, pursuant to statutory authority, entered into an agreement with FATCO for the harvesting, processing and selling of timber grown on the reservation. The White Mountain Apache Tribe has no treaty relationship with the United States, its reservation having been created by executive order.

Although B.I.A. has contracted with FATCO for certain lumbering operations, the B.I.A. directly selects the trees to be cut, dictates how many trees will be harvested, where logging roads will be built, and how they will be maintained. The B.I.A. also controls the type of equipment Pinetop can use to haul lumber, the speeds logging equipment may travel, and the width, length, height and weight of loads.

Pinetop has had a contractual relationship with the tribe (approved by B.I.A.) since 1969. Its entire logging operation is conducted on the Fort Apache Indian Reservation and, with the exception of passing over state highways at a few locations,[3/] Pinetop vehicles use only roads built and maintained by B.I.A., the tribe, or Pinetop itself.

3/ Pinetop has kept records concerning the amount of fuel used while traveling on state highways and does not seek a refund for fuel taxes or motor carrier license taxes attributable to state highway use.

In 1971, the Arizona Highway Department, pursuant to A.R.S. § 40-641 (motor carrier license tax) and A.R.S. § 28-1552 (use fuel taxes), sought to collect a motor carrier license tax of 2.5% of Pinetop's gross receipts from its carrier operations and the sum of eight cents per gallon for diesel fuel used by Pinetop in the propulsion of its motor vehicles. These taxes were paid under protest and suit was brought for their recovery.

A.R.S. § 40-601(A)(10) provides a "pulpwood exemption," that is, any private motor carrier in the business of harvesting pulpwood logs is exempt from the 2.5% common carrier license tax.

It appears that 60% of the logs actually harvested by Pinetop are ultimately used for pulpwood. All logs harvested and hauled by Pinetop are delivered to FATCO milling operations at Whiteriver, Arizona. At that point, the logs are segregated according to size for milling. If a particular log cannot be processed in the two mills located in Whiteriver, it is sent to a "chipper" which reduces the log to chips which are then sold to Southwest Forest Industries Paper Mill in Snowflake, Arizona. Pinetop does not harvest or haul pulpwood logs or chips directly to Southwest Forest Industries nor does it have any contractual relationship with Southwest Forest Industries.

By affidavit, it is alleged that since the tribe and Pinetop did not contemplate the tax liability of Pinetop for its logging operations, the tribe has agreed to pay the taxes involved in this litigation to Pinetop.

Pinetop contents its operations on the Fort Apache Indian Reservation are immune from state taxation on three theories; (1) that there exist statutory or constitu-

[585 P.2d 895]

tional prohibitions against such taxation; (2) that such taxation is prohibited by reason of federal preemption; and (3) that such taxation results in an infringement on Indian self-government.

In addition, Pinetop asserts that in any event, under state law it is entitled to a partial exemption on the motor license tax under the so-called "pulpwood exemption." These contentions will be discussed in the order presented.

STATUTORY PROHIBITIONS

Arizona has sought the collection of taxes in dispute under A.R.S. § 40-641 and A.R.S. § 28-1552. These statutes provide in part:

A.R.S. § 40-641:

> "A. In addition to all other taxes and fees:
>
> "1. Every common motor carrier of property and every contract motor carrier of property shall pay to the state, on or before the twenty-fifth day of each month, a license tax of two and one-half percent of the gross receipts from the carrier's operations within the state for the preceding calendar month . . .."

A.R.S. § 28-1552:

> "For the purpose of partially compensating the state for the use of its highways, an excise tax is imposed at the rate of eight cents per gallon upon use fuel used in the propulsion of a motor vehicle on any highway within this state . . .."

Pinetop argues that the Arizona Enabling Act, 36 Stat. 557, 569, makes it immune from the imposition of the taxes involved. In this regard, it concedes that the Arizona courts' interpretation of that act would not prohibit the tax sought to be imposed.4/

Rather, Pinetop argues that since the Arizona Enabling Act was the result of a federal statute, federal interpretation must prevail. It then argues that McClanahan v. State Tax Commission, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973), can be construed as holding that the Arizona Enabling Act prohibits the taxation sought here.

4/ See Industrial Uranium Co. v. State Tax Comm'n., 95 Ariz. 130, 387 P.2d 1013 (1963) (upholding applicability of Arizona transaction privilege tax on non-Indian corporation engaged in mining operations on Navajo Reservation); Kahn v. Arizona State Tax Comm'n., 16 Ariz. App. 17, 490 P.2d 846 (1971), appeal dismissed for lack of federal question, 411 U.S. 941, 93 S.Ct. 1917, 36 L.Ed.2d 404 (1973) (holding that enabling act did not withdraw reservation lands from jurisdiction of Arizona); Pima County v. American Smelting & Refining Co., 21 Ariz. App. 406, 520 P.2d 319 (1974); Francisco v. State, 113 Ariz. 427, 556 P.2d 1 (1976).

We do not determine here whether federal law has usurped the power of the courts of the State of Arizona to interpret its own organic law, for in our opinion, McClanahan does not have the force Pinetop attributes to it, and other federal cases interpreting other similar enabling acts come to a contrary conclusion.

The Arizona Enabling Act, 36 Stat. 557, 569 provides in part:

> "That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title . . . to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States . . . but nothing herein . . . shall preclude the said State from taxing as other lands and other property are taxed any lands and other property outside of an Indian reservation owned or held by any Indian . . .."

In McClanahan, the United States Supreme Court held that this portion of the Enabling Act was an expression of Congress' assumption that the states lacked jurisdiction over Indians living on the reservation. McClanahan v. State Tax Commission, supra, 411 U.S. at 175, 93 S.Ct. at 1264, 36 L.Ed.2d at 137. As to that portion of the Enabling Act allowing the taxation of non-reservation Indians, McClanahan held:

> "It is true, of course, that exemptions from tax laws should, as a general rule, be clearly expressed. But we have in the

> [585 P.2d 896]
>
> past construed language far more ambiguous than this as providing a tax exemption for Indians, [citations omitted], and we see no reason to give this language an especially crabbed or restrictive meaning." (emphasis added) 411 U.S. at 176, 93 S.Ct. at 1264, 36 L.Ed.2d at 138.

However, there is nothing in McClanahan, which would indicate that Arizona's Enabling Act intended to prohibit the taxation of non-Indians whose contractual business arrangements with a corporation on an Indian reservation formed by an executive order required them to perform services on that reservation. See Dept. of Revenue v. Hane Const. Co., 115 Ariz. 243, 564 P.2d 932 (App. 1977).

Moreover, it has long been held that enabling acts such as Arizona's did not afford protection for non-Indians from state taxation, even for activities conducted on Indian reservations. Thus, as early as 1896, in the case of Truscott v. Hurlbut Land & Cattle Co., 73 F. 60 (9th Cir. 1896), it was held that personal property belonging to non-Indians located on an Indian reservation was subject to state taxation in spite of Montana's Enabling Act. See also Utah & N. Ry. v. Fisher, 116 U.S. 28, 6 S.Ct. 246, 29 L.Ed. 542 (1885) holding Idaho could properly tax a non-Indian corporation owned railroad

running through an Indian reservation.5/

However, we understand Pinetop's argument to be that the use fuel tax and the motor carrier license tax are levied on Pinetop's use of travelled road and as such falls within the Enabling Act language. We disagree with this characterization of the taxes involved. Neither tax is directly related to Indian lands, nor are they property taxes. The use fuel tax is an excise tax imposed upon the use of diesel fuel consumed in the propulsion of motor vehicles within the State of Arizona. A.R.S. § 28-1552. The motor carrier license tax is imposed on gross receipts and as such is in the nature of a tax on the privilege of doing business in this state. See Shaw v. State, 8 Ariz. App. 447, 447 P.2d 262 (1968). Neither tax has as its nexus, transactions between Pinetop and an Indian tribe, rather both taxes are based upon activities Pinetop has seen fit to conduct within the confines of the State of Arizona. In this sense, for Enabling Act purposes, it is as immaterial that these activities are conducted on an Indian reservation as it would be if they were conducted by Pinetop on a national

5/ For other cases upholding the right of a state to tax non-Indian transactions, although occurring on an Indian reservation, see Moe Confederated Salish & Kootenai Tribes, 425 U.S. 463, 96 S.Ct. 1634 48 L.Ed.2d 96 (1976); Thomas v. Gay, 169 U.S. 264, 18 S.Ct. 340, 42 L.Ed. 740 (1898); G. M. Shupe, Inc. v. Bureau of Revenue, 89 N.M. 265, 550 P.2d 277 (1976); Chief Seattle Properties, Inc. v. Kitsap County, 86 Wash.2d 7, 541 P.2d 699 (1975).

forest. See Wilson v. Cook 327 U.S. 474, 66 S.Ct. 663, 90 L.Ed. 793 (1946); Dept. of Revenue v. Hane Const. Co., supra.

We therefore reject Pinetop's contention that Arizona's Enabling Act prohibits these taxes.

Pinetop next contends that 25 C.F.R. § 1.4 (1977) ousts the state from imposing the taxes sought here. This federal regulation provides in part:

> "(a) . . . none of the laws, ordinances, codes, resolutions, rules or other regulations of any State . . . limiting, zoning or otherwise governing, regulating, or controlling the use . . . of any . . . personal property . . . shall be applicable to any such property . . . belonging to any Indian or Indian tribe . . . that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States." (emphasis added)

The state suggests that this regulation is an unauthorized legislative action by the Secretary of the Interior and that as such is invalid. See Norvell v. Sangre de Cristo Development Co., 372 F. Supp. 348 (D.N.M. 1974), rev'd for lack of controversy, 519 F.2d, 370 (10th Cir. 1975). We need not make that determination here, however, for in our opinion the regulation, if valid, is not applicable to the facts in this case.

The regulation, by its own terms, seeks to limit the applicability of state laws to real

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or personal property "belonging to any Indian or Indian tribe." Again, Pinetop seeks to characterize the cases involved here as somehow related to tribal property. As previously pointed out, this characterization is incorrect. These taxes are levied upon the activity of Pinetop, a non-Indian. For the reasons we found Arizona's Enabling Act to be inapplicable, we likewise find 25 C.F.R. § 1.4 (1977) to be inapplicable to prohibit the levying of these taxes.

At this point, we deal with the bare allegation that the White Mountain Apache Tribe has agreed to reimburse Pinetop for its tax liability should these taxes be upheld. We first note that if the tribe has agreed to pay the taxes due here, being under no contractual or legal obligation to do so, it is a mere volunteer and as such cannot complain. See Maricopa County v. Arizona Citrus Land Co., 55 Ariz. 234, 100 P.2d, 587 (1940).

On the other hand, if the argument is that the economic burden of these taxes will ultimately fall on the tribe (by Pinetop raising the price of its services to the tribe to cover this expenditure), such an economic burden on a non-tax-paying entity will not invalidate the state tax. United States v. City of Detroit, 355 U.S. 466, 78 S.Ct. 474, 2 L.Ed.2d 424 (1958); Murray v. State, 62 Wash.2d 619, 384 P.2d 337 (1963). As was stated in United States v. City of Detroit, supra:

> "At the same time it is well settled that the Government's constitutional immunity [United States immunity from state taxation] does not shield private parties with whom it does business from state taxes imposed on them merely because part or all of the financial burden of the tax eventually falls on the Government." 355 U.S. at 469, 78 S.Ct. at 476, 2 L.Ed.2d at 427.

We therefore reject Pinetop's "ultimate burden" argument.

PREEMPTION BY FEDERAL GOVERNMENT

Pinetop next argues that the federal government has so preempted the field of harvesting tribal lumber, that state taxation in the area is prohibited. This contention is bottomed on the rationale of Warren Trading Post Co. v. Arizona State Tax Commission, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965). In Warren Trading Post, the United States Supreme Court held that the State of Arizona could not impose a transaction privilege tax on Indian traders, as the federal government had so regulated the Indian trading field including making "sure that prices charged are fair and reasonable" that a preemption of the area from state interference had occurred. In so holding, the Court noted:

> "This state tax on gross income would put financial burdens on appellant or the Indian with whom it deals in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against

prices deemed unfair or unreasonable by the Indian Commissioner." 380 U.S. at 691, 85 S.Ct. at 1246, 14 L.Ed.2d at 169.

Pinetop points to the extensive federal regulations dealing with the harvesting of tribal timber,[6] and claims a similar preemption here. In particular, Pinetop contends that the federal regulations seek to insure the financial integrity of the timber operation, the utilization of Indian labor, the protection of recreational or aesthetic values of the forest, and the preservation and development of grazing and wildlife. Pinetop then contends the taxation sought here will interfere with these federally mandated objectives.

First, we doubt that the combined annual use fuel and the motor carrier license tax of $9,000.00 assessed against Pinetop is going to seriously interfere with the tribe's objectives when its net revenues from timbering operations exceeds $1,500,000 per year. However, we do not place much reliance upon this lack of "interference." Rather, in

[585 P.2d 898]

our opinion, the federal regulations involved here do not result in a preemption of the field by the federal government.

In Commonwealth of Pennsylvania v. Nelson, 350 U.S. 497, 76 S.Ct. 477, 100 L.Ed. 640 (1956) a three-prong test was enunciated to determine whether a federal

6/ See, e.g., 25 C.F.R. § 141.1, et seq. (1977).

regulation had preempted a particular field:

> "First, '[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.' 350 U.S. at 502, 76 S.Ct. at 480, 100 L.Ed. at 652, quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447, 1459 (1946).
>
> * * *
>
> "Second, the federal statutes 'touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject.' 350 U.S. at 504, 76 S.Ct. at 481, 100 L.Ed. at 653, quoting Rice v. Santa Fe Elevator Corp., supra, 331 U.S. at 230, 67 S.Ct. at 1152, 91 L.Ed. at 1459.
>
> * * *
>
> "Third, enforcement of state . . . acts presents a serious danger of conflict with the administration of the federal program." 350 U.S. at 505, 76 S.Ct. at 482, 100 L.Ed. at 654.

Applying these tests, we note that none of the regulations quoted to us seek to control the licensing of non-Indian haulers, the prices charged for that hauling (although Pinetop's contracts are subject to B.I.A. approval), the federal taxing of any operation of Pinetop, nor do

the federal regulations speak of who may conduct the hauling operations. Thus, unlike Warren Trading Post, there is no specific federal regulation seeking to regulate the "fair and reasonable" prices Pinetop may charge for its services.

As to the second criteria (dominant federal interest in the field) while the federal government may have a dominant interest in the harvesting of tribal lumber, there is nothing to indicate that this same interest was intended " . . . to preempt the field of regulating commercial activities between Indians and non-Indians." Palm Springs Spa, Inc. v. County of Riverside, 18 Cal.App.3d 372, 379, 95 Cal. Rptr. 879, 883 (1971). In particular, we find nothing to indicate that the federal government intended to dominate and exclusively control the right to tax the privilege of doing business in the state and the consumption of motor vehicle fuel within the state, an area traditionally left to the states. The federal regulations, even by inference, are silent on the subject.

As to the third criteria (conflict with federal administration) Pinetop raises the specter of state laws impinging the financial integrity of its timber operations, or "will force the tribe to alter its desired methods of operation in order to avoid these taxes."7/ As previously pointed out, the tribe has no liability for these taxes and thus this ghost is merely a kindred spirit to its "ultimate financial burden" argument, which we have previously rejected.

7/ Reply Brief for Appellant at 14.

Finally, Pinetop argues that a factual dispute exists as to the preemption question. We disagree. Assuming that the federal regulations have the effect contended by Pinetop, we find no federal preemption of Pinetop's operation with the tribe which would preclude the state taxes sought to be imposed here.

IMPINGEMENT OF TRIBAL RIGHT OF SELF-GOVERNMENT

Pinetop's attack under this heading is multi-faceted. Pinetop argues that these taxes cause interference in the following areas:

1. With tribal judgments about who may use tribal roads.

2. With control of its timber resources by conditioning non-Indian use upon payment of taxes to the state.

3. With tribal choice of the means of managing and harvesting lumber.

[585 P.2d 899]

4. With the planning and scope of reservation economic development.

5. With the tribe's building of passable roads.

6. With the tribe's ability to tax the same activities.

In our opinion, these "infringements" are more imaginary then real. In the final analysis, most of these arguments

are based on the hypothesis that the ultimate burden of Pinetop's having to pay approximately $9,000.00 annually in excise privilege taxes is going to be borne by the tribe. As previously suggested, the idea that payment of this sum is going to bring a net million and half dollar operation to its knees is pure sophistry. Moreover, Pinetop has failed to cite us to any case which holds that a state tax imposed upon a non-Indian doing business with a tribe results in an "infringement" of the tribe's right of self government.8/ The weight of authority is clearly to the contrary. See Fort Mojave Tribe v. County of San Bernardino, 543 F.2d 1253 (9th Cir. 1976), cert. denied, 430 U.S. 983, 97 S.Ct. 1678, 52 L.Ed.2d 377 (1977); Chief Seattle Properties, Inc. v. Kitsap County, 86 Wash.2d 7, 541 P.2d 699 (1975); Agua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d 1184 (9th Cir. 1971); Moe v. Confederated Salish and Kootenai Tribes, supra; Kahn v. Arizona State Tax Comm'n., supra; Industrial Uranium Co. v. State Tax Comm'n., supra.

8/ Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975), cert. denied, 429 U.S. 1038, 97 S.Ct. 731, 50 L.Ed.2d 748 (1977), cited by Pinetop dealt with the attempted imposition of local zoning ordinances on Indian land. Likewise, Eastern Navajo Industries, Inc. v. Bureau of Revenue, 89 N.M. 369, 552 P.2d 805 (N.M. App. 1976), cert. denied, 430 U.S. 959, 97 S.Ct. 1610, ____ L.Ed.2d ____ (1977), also cited by Pinetop dealt with the purported taxation of a corporation which was an agency of the Navajo Tribe and in which the majority of stock was owned by Indians.

Also, Pinetop's Indian Commerce Clause argument based upon Article 1, § 8 of the United States Constitution, has been sufficiently answered in Moe v. Confederated Salish and Kootenai Tribes, supra.

Based on the foregoing authority, we reject Pinetop's infringement argument.

PULPWOOD EXEMPTION

Under the statutory scheme of classification of motor carriers, "private motor carriers" are exempt from the payment of the motor carrier license tax. A.R.S. § 40-601(A)(10) provides that carriers who are engaged in:

> "transporting of pulpwood logs which are consumed in the manufacture of pulp or paper within the state of Arizona by a person in the business of harvesting such pulpwood logs shall be deemed . . . to be a private motor carrier when so engaged. For purposes of this paragraph 'pulpwood logs' means logs which are used or intended for use as a raw material in the manufacture of pulp or paper."

Pinetop contends that since 60% of the logs it harvests ultimately end up as pulpwood, it is entitled to an exemption on 60% of its gross revenues derived from its logging operations. The state on the other hand argues that since Pinetop has no contractual relationship with Southwest Forest Industries (the paper manufacturer) and since it does not actually haul the pulpwood logs or chips to the Southwest Forest Industries Paper Mill, it cannot

claim the exemption. The state also argues that since the waste from logs actually destined for finished timber is likewise sent to Southwest Forest Industries, it would be virtually impossible to ascertain the extent of the exemption. Since Pinetop claims no exemption for such waste, we do not consider this aspect of the state's argument.

The proper interpretation of the so-called "pulpwood exemption" requires an historical analysis of the amendment creating that exemption. In 1969, the Arizona Supreme Court held in Boyes v. State, 105 Ariz. 34, 459 P.2d 86 (1969) that the transportation of pulpwood logs by one who also harvested those logs was not a private carrier and that the transportation was not merely an incident of the commercial enterprise of harvesting and thus was not entitled to an exemption from the tax imposed.

[585 P.2d 900]

The following year, the legislature amended the statute so as to specifically provide that the transportation of pulpwood logs was to be considered as "incidental" to the commercial enterprise of pulpwood harvesting, thus entitled to an exemption.

With this background in mind, we see nothing that requires that the harvester/transporter in order to be entitled to the exemption, complete the journey from the forest to the mill. Rather, the point of inquiry is whether the logs harvested and subsequently transported are "intended for use as a raw material in the manufacture of pulp or paper."

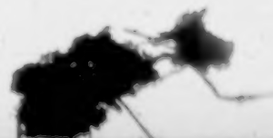
The stipulated facts here are that at the time of harvest, because of size, 60% of the trees cut by Pinetop are ultimately "intended for use" as pulpwood. While it is true that the actual segregation of the logs occurs at the FATCO lumber mill at Whiteriver, it would do violence to the parties' stipulated facts to suggest that at the time of harvesting, the parties had no knowledge as to what trees were destined for pulpwood usage.

The state argues that exemptions to taxes are to be strictly construed. However, the interpretation urged by the state would require us to add to the phrase "a pulpwood harvester transporting such pulpwood logs shall be deemed to be a private motor carrier when so engaged," the words "and the harvester completes the journey to the paper mill."

Under the stipulated facts herein, since the state does not argue that the apportionment of the exemption is improper, Pinetop is entitled to a 60% exemption on gross revenues derived from its transportation activities.

The judgments appealed from are affirmed in part and reversed in part and the matter remanded for a determination of the amount of refund due Pinetop as a result of the "pulpwood exemption."

EUBANK, P.J., and OGG, J., concur.



APPENDIX E

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

WHITE MOUNTAIN APACHE TRIBE, an Indian tribe established pursuant to Executive Order, et al., Appellants, vs. ROBERT M. BRACKER, Chairman of the Arizona Department of Transportation Board, et al., Appellees.	1 CA-CIV 3226 (Consolidated with No. 1 CA-CIV 3619) DEPARTMENT B MARICOPA County Superior Court No. C-256110 O R D E R [Filed June 29, 1978]

The above-entitled matter was duly submitted to the Court. The Court has this day rendered its opinion.

IT IS ORDERED that the opinion be filed by the Clerk.

IT IS FURTHER ORDERED that a copy of this order together with a copy of the opinion be sent to each party appearing herein or the attorney for such party, to the Honorable Roger G. Strand and the Honorable Rufus C. Coulter, Jr., Judges.

DATED this 29th day of June, 1978.

/s/ William E. Eubank
WILLIAM E. EUBANK
PRESIDING JUDGE

APPENDIX F

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

WHITE MOUNTAIN APACHE TRIBE, an Indian tribe established pursuant to Executive Order, et al., Appellants, vs. ROBERT M. BRACKER, Chairman of the Arizona Department of Transportation Board, et al., Appellees.	1 CA-CIV 3226 (Consolidated with No. 1 CA-CIV 3619) DEPARTMENT B MARICOPA County Superior Court No. C-256110 ORDER [Filed August 28, 1978]

The motion for rehearing has been considered by the Court, Presiding Judge William E. Eubank and Judges Eino M. Jacobson and Jack L. Ogg participating.

IT IS ORDERED that the motion for rehearing is denied.

DATED this 28th day of August, 1978.

/s/ William E. Eubank
WILLIAM E. EUBANK
PRESIDING JUDGE

APPENDIX G

SUPREME COURT
STATE OF ARIZONA

WHITE MOUNTAIN APACHE TRIBE, an Indian tribe established pursuant to Executive Order; et al., Appellants, vs. ROBERT M. BRACKER, Chairman of the Arizona Department of Transportation Board; et al., Appellees.	Supreme Court No. 13962-PR Court of Appeals No. 1 CA-CIV 3226 1 CA-CIV 3619 (Consolidated) Maricopa County No. C-256110 ORDER [Filed October 4, 1978]

The following action was taken by the Supreme Court of the State of Arizona on October 3, 1978 in regard to the above-entitled cause:

"ORDERED: Petition for Review = DENIED."

Record returned to the Court of Appeals, Division One, Phoenix, this 4th day of October, 1978.

CLIFFORD H. WARD, Clerk
By /s/ Mary Ann Hopkins
Deputy Clerk

APPENDIX H

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. United States Constitution Art. I § 8

The Congress shall have Power . . .
. . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

2. United States Constitution Art. IV § 3

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

3. 25 U.S.C. § 196 (1976)

Sale or other disposition of dead timber

The President of the United States may from year to year in his discretion under such regulations as he may prescribe authorize the Indians residing on reservations or allotments, the fee to which remains in the United States, to fell, cut, remove, sell or otherwise dispose of the dead timber standing, or fallen, on such reservation or allotment for the

sole benefit of such Indian or Indians. But whenever there is reasonable cause to believe that such timber has been killed, burned, girdled, or otherwise injured for the purpose of securing its sale under this section then in that case such authority shall not be granted.

4. 25 U.S.C. § 406 (1976)

Sale of timber on lands held under trust--Deductions for administrative expenses; standards guiding sales

(a) The timber on any Indian land held under a trust or other patent containing restrictions on alienations may be sold by the owner or owners with the consent of the Secretary of the Interior, and the proceeds from such sales, after deductions for administrative expenses to the extent permissible under section 413 of this title shall be paid to the owner or owners or disposed of for their benefit under regulations to be prescribed by the Secretary of the Interior. It is the intention of Congress that a deduction for administrative expenses may be made in any case unless the deduction would violate a treaty obligation or amount to a taking of private property for public use without just compensation in violation of the fifth amendment to the Constitution. Sales of timber under this subsection shall be based upon a consideration of the needs and best interests of the Indian owner and his heirs. The Secretary shall take into consideration, among other things, (1) the state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his

heirs, (2) the highest and best use of the land, including the advisability and practicality of devoting it to other uses for the benefit of the owner and his heirs, and (3) the present and future financial needs of the owner and his heirs.

(b) Upon the request of the owners of a majority Indian interest in land in which any undivided interest is held under a trust or other patent containing restrictions on alienations, the Secretary of the Interior is authorized to sell all undivided Indian trust or restricted interests in any part of the timber on such land.

(c) Upon the request of the owner of an undivided but unrestricted interest in land in which there are trust or restricted Indian interests, the Secretary of the Interior is authorized to include such unrestricted interest in a sale of the trust or restricted Indian interests in timber sold pursuant to this section, and to perform any functions required of him by the contract of sale for both the restricted and the unrestricted interests, including the collection and disbursement of payments for timber and the deduction from such payments of sums in lieu of administrative expenses.

(d) For the purposes of this Act, the Secretary of the Interior is authorized to represent any Indian owner (1) who is a minor, (2) who has been adjudicated non compos mentis, (3) whose ownership interest in a decedent's estate has not been determined, or (4) who cannot be located by the Secretary after a reasonable and

diligent search and the giving of notice by publication.

(e) The timber on any Indian land held under a trust or other patent containing restrictions on alienations may be sold by the Secretary of the Interior without the consent of the owners when in his judgment such action is necessary to prevent loss of values resulting from fire, insects, disease, windthrow, or other natural catasrophes.

5. 25 U.S.C. § 407 (1976)

Sale of timber on unallotted lands

The timber on unallotted lands of any Indian reservation may be sold in accordance with the principles of sustained yield, or in order to convert the land to a more desirable use, under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales, after deductions for administrative expenses pursuant to section 413 of this title, shall be used for the benefit of the Indians who are members of the tribe or tribes concerned in such manner as he may direct.

6. 25 U.S.C. § 476 (1976)

Organization of Indian tribes; constitution and bylaws; special election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution

and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

7. Arizona Enabling Act, 36 Stat. 557, 569

Sec. 20. . . .

. . .

Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; that the lands and other property belonging to citizens of the United States residing without the said State shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by the State upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing as other lands and other property are taxed any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any Act of Congress, but said ordinance shall provide that all such lands shall be

exempt from taxation by said State so long and to such extent as Congress has prescribed or may hereafter prescribe.

8. 25 C.F.R. § 1.4 (1978)

State and local regulation of the use of Indian property.

(a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

(b) The Secretary of the Interior or his authorized representative may in specific cases or in specific geographic areas adopt or make applicable to Indian lands all or any part of such laws, ordinances, codes, resolutions, rules or other regulations referred to in paragraph (a) of this section as he shall determine to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property. In determining whether, or to what extent, such laws, ordinances, codes, resolutions, rules or other regulations shall be adopted or made applicable, the Secretary or his authorized representative may

consult with the Indian owner or owners and may consider the use of, and restrictions or limitations on the use of, other property in the vicinity, and such other factors as he shall deem appropriate.

9. 25 C.F.R. §§ 141, 142 (1978)

SUBCHAPTER M—FORESTRY

PART 141—GENERAL FOREST REGULATIONS

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AUTHORITY: Secs. 7, 8, 36 Stat. 857, 25 U.S.C. 406, 407; and sec. 6, 48 Stat. 986, 25 U.S.C. 466; 47 Stat. 1417, 25 U.S.C. 413. § 141.23 issued under 5 U.S.C. 301, 25 U.S.C. 2, unless otherwise noted.

CROSS REFERENCES: For rights-of-way, see Part 161 of this chapter. For sale of forest products, Red Lake Indian Reservation, Minnesota, see Part 144 of this chapter. For sale of lumber and other forest products produced by Indian enterprises from other reservations, see Part 142 of this chapter. For wilderness and roadless areas, see Part 163 of this chapter. For law and order, see Part 11 of this chapter.

§ 141.1 Definitions.

As used in this part:

(a) "Secretary" means the Secretary of the Interior or his authorized representative.

(b) "Indian forest lands" means lands held in trust by the United States for Indian tribes or individual Indians or owned by such tribes or individuals subject to restrictions against alienation, that are considered to be chiefly valuable for the production of forest crops, or on which it is considered that a forest cover should be maintained in order to protect watershed or other values. A formal inspection and land classification action is not required before applying the provisions of this Part 141 to the management of any particular tract of land.

(c) "Stumpage value" means the value of uncut timber as it stands in the woods.

(d) "Stumpage rate" means the stumpage value per thousand board feet or other unit of measure.

[24 FR 7870, Sept. 30, 1959, as amended at 27 FR 12929, Dec. 29, 1962]

§ 141.2 Scope.

The regulations in this part are applicable to all Indian forest lands except as this part may be superseded by special legislation.

[24 FR 7870, Sept. 30, 1959]

§ 141.3 Objectives.

(a) The following objectives are to be sought in the management of unallotted Indian forest lands in accordance with the principles of sustained yield:

(1) The preservation of such lands in a perpetually productive state by providing effective protection, by applying sound silvicultural and economic principles to the harvesting of the timber, and by making adequate provision for new forest growth as the timber is removed.

(2) The regulation of the cut in a manner which will insure method and order in harvesting the tree capital, so as to make possible continuous production and a perpetual forest business.

(3) The development of Indian forests by the Indian people for the purpose of promoting self-sustaining communities, to the end that the Indians may receive from their own property not only the stumpage value, but also the benefit of whatever profit it is capable of yielding and whatever labor the Indians are qualified to perform.

(4) The sale of Indian timber in open competitive markets in accordance with good business practices on reservations where the volume that should be harvested annually is in excess of that which is being developed by the Indians.

(5) The preservation of the forest in its natural state wherever it is considered, and the authorized Indian representatives agree, that the recreational or aesthetic value of the forest to the Indians exceeds its value for the production of forest products.

(6) The management of the forest in such a manner as to retain its beneficial effects in regulating water runoff and minimizing erosion.

(7) The preservation and development of grazing, wildlife, and other values of the forest to the extent that such action is in the best interest of the Indians.

(b) Similar objectives are sought in the management of allotted Indian forest lands, but, in addition, the sales of timber shall be based upon a consideration of the needs and best interests of the Indian owner and his heirs. The Secretary shall take into consideration, among other things:

(1) The state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs.

(2) The highest and best use of the land, including the advisability of devoting it to other uses for the benefit of the owner and his heirs.

(3) The present and future financial needs of the owner and his heirs.

[29 FR 14740, Oct. 29, 1964]

§ 141.4 Sustained-yield management.

In accordance with the objectives set forth in § 141.3, the harvest of timber from Indian forest lands will not be authorized until there have been prescribed practical methods of cutting, based on sound silvicultural principles. Cutting schedules shall be directed toward the salvage of timber that is deteriorating as a result of fire damage, insect infestation, disease, over-maturity or other cause; and toward achieving an approximate balance between maximum net growth and harvest during each cutting cycle. For all Indian reservations of major importance from an industrial forestry standpoint, management plans for the forest resource shall be prepared by the Bureau of Indian Affairs, and revised as needed. The plans shall contain a statement of the manner in which the policies of the Bureau of Indian Affairs are to be applied on the forest, with a definite plan of silvicultural management and a program of action, including a cutting schedule, for a specified period in the future.

[24 FR 7870, Sept. 30, 1959]

§ 141.5 Cutting restrictions.

Clearcutting of large contiguous areas will be permitted only on lands that, when cleared, will be devoted to a more beneficial use than the growing of timber crops; but this restriction shall not prohibit clearcutting, by staggered settings or otherwise, when it is silviculturally good practice to harvest a particular stand of timber by such methods, or when it is not practicable to harvest such timber stand by methods other than clearcutting.

[24 FR 7870, Sept. 30, 1959]

§ 141.6 Indian operations.

Subject to approval by the Secretary, the following actions may be taken:

(a) Indian tribal logging or sawmill enterprises may be initiated and organized with the consent of the authorized tribal representatives.

(b) Such enterprises which do not operate under the provisions of Part 142 of this chapter shall enter into formal agreements with tribal representatives for the use of tribal timber, and with the individual Indian owners for allotted timber.

(c) Such enterprises may contract for the purchase of Indian-owned timber with the consent of the tribal representatives or the individual owners at stumpage rates established by the Secretary.

(d) Such enterprises may negotiate for the purchase of non-Indian owned timber.

(e) Performance bonds need not be required in connection with the use of timber by such enterprises.

(f) Payment for tribal timber cut by such enterprises may be authorized by methods other than those in § 141.15.

(g) Authorized officers of tribal enterprises, operating under approved agreements for the use of tribal or allotted timber pursuant to this section, may sell the forest products produced in accordance with generally accepted trade practices without compliance with section 3709 of the Revised Statutes.

[27 FR 12929, Dec. 29, 1962]

§ 141.7 Timber sales from unallotted and allotted lands.

(a) On reservations where the volume of timber available for cutting is in excess of that which is being developed by the Indians, open market sales of Indian timber will be authorized: *Provided*, That consent is given by the authorized representative of the tribe for tribal timber and by the owners of a majority Indian interest in trust or restricted timber on allotted lands. The consent of the Secretary is required in all cases.

(b) The Secretary may sell the timber on any Indian land held under a trust or other patent containing restrictions on alienations without the consent of the owners when in his judgment such action is necessary to prevent loss of values resulting from fire, insects, disease, windthrow, or other catastrophes.

(c) Unless otherwise authorized by the Secretary, sales from unallotted lands, allotted lands, or a combination of these two ownerships having a stumpage value exceeding $2,500 will not be approved until an examination of the timber to be sold has been made by a qualified forest officer and a report setting forth all pertinent information has been submitted to the officer authorized to approve the contract as provided in § 141.13. In all such sales of timber exceeding $2,500 in value, the timber shall be appraised and sold at not less than its appraised value.

[38 FR 24638, Sept. 10, 1973]

§ 141.8 Advertisement of sales.

Except as provided in §§ 141.6, 141.9, and 141.19, sales of timber shall be made only after advertising.

(a) The advertisement shall be approved by the officer who will approve the contract. Advertised sales shall be made under sealed bids, or at public auction, or under a combination thereof. The advertisement may limit sales of Indian timber to members of the tribe, or may grant to members of the tribe who submitted bids the right to meet the higher bid of a non-Indian. If the estimated stumpage value of the timber offered does not exceed $1,000, the advertisement may be made by posters and circular letters. If the estimated stumpage value exceeds $1,000, the advertisement shall also be made in at least one edition of a newspaper of general circulation in the locality where the timber is situated. If the estimated stumpage value does not exceed $10,000, the advertisement shall be for not less than 15 days; if the estimated stumpage value exceeds $10,000 but not $100,000, for not less than 30 days; and if the estimated stumpage value exceeds $100,000, for not less than 60 days.

(b) The approving officer may reduce the advertising period because of emergencies such as fire, beetle attack, blowdown, limitation of time, or when there would be no practical advantage in advertising for the prescribed periods.

(c) If no contract is executed after such advertisement, the approving officer may, within 1 year from the last day on which bids were to be received as defined in the advertisement, permit the sale of such timber in the open market upon the terms and conditions in the advertisement and at not less than the advertised value or the appraised value at the time of sale, whichever is greater.

[24 FR 7870, Sept. 30, 1959, as amended at 27 FR 12929, Dec. 29, 1962]

§ 141.9 Timber sales without advertisement.

Sales of timber may be made without advertisement with the consent of the authorized representative of the tribe for tribal timber or with the consent of the owners of a majority Indian interest in trust or restricted timber on allotted lands, and the approval of the Secretary: (a) To Indians or non-Indians when the timber is to be cut in conjunction with the granting of a right-of-way or authorized occupancy, or must be cut to protect the forest from injury, or if it is impractical to secure competition by formal advertising procedures, or when otherwise specifically authorized by statutes or regulations; or (b) To Indians who are members of the tribe for stumpage value not exceeding $10,000. Such contracts shall not be made for a longer term than 2 years. The stumpage rates in connection with such sales shall be established by the approving officer after due appraisal procedure. Timber contract forms executed under authority hereof shall be those stipulated for the sale of timber under § 141.12, and shall carry the bond requirement stipulated in § 141.14. No more than one such sale without advertisement may be made to any person or operating group of persons in any 1 calendar year. In the case of each negotiated transaction the approving officer shall establish a documented record of the transaction, including a written determination and finding that the transaction is of a type or class allowing the negotiation procedures or warranting departure from the procedures provided in § 141.8; the extent of solicitation and competition, or a statement of the facts upon which a finding of impracticability of securing competition is based; and a statement of the factors on which the award is based, including a determination as to the reasonability of the price accepted.

[38 FR 24638, Sept. 10, 1973]

§ 141.10 Deposit with bid.

(a) A deposit shall be made with each proposal for the purchase of either allotted or unallotted Indian timber. Such deposits shall be at least 20 percent if the appraised stumpage value is less than $10,000; at least 10 percent if the appraised stumpage value is between $10,000 and $100,000, but in any event not less than $2,000; at least 5 percent if the appraised stumpage value is between $100,000 and $250,000, but in any event not less than $10,000; and at least 3 percent if the appraised stumpage value exceeds $250,000, but in any event not less than $12,500.

(b) Deposits shall be in the form of either a certified check, cashier's check, bank draft, or postal money order, drawn payable to the order of the Bureau of Indian Affairs, or in cash.

(c) The deposit of the apparent high bidder, and of others who submit written requests to have their bids considered for acceptance, will be retained pending acceptance or rejection of the bids. All other deposits will be returned promptly following the opening and posting of bids.

(d) The deposit of the successful bidder will be retained as liquidated damages if the bidder does not execute the contract, and furnish the performance bond required by § 141.14, within the time stipulated in the advertisement of timber sale.

[24 FR 7871, Sept. 30, 1959]

§ 141.11 Acceptance and rejection of bids.

(a) Applicants or bidders may be individuals, associations of individuals, or corporations. In ordinary circumstances the high bid received in connection with any advertisement issued under authority of this part shall be accepted. However, the approving officer, having set forth his reasons in writing shall have the right to reject the high bid:

(1) If he considers the high bidder to be unqualified to fulfill the contractual requirement of the advertisement, or

(2) If he has reasonable grounds to consider it in the interest of the Indians to reject the high bid.

(b) If the high bid is rejected, the approving officer may authorize:

(1) Rejection of all bids, or

(2) Acceptance of the offer of another bidder who, at the time of opening of bids, makes formal request that his bid be so considered.

(c) The officer authorized to accept the bid is also authorized in his discretion to waive minor technical defects in advertisements and proposals.

[24 FR 7871, Sept. 30, 1959]

§ 141.12 Contracts required.

Except as provided in § 141.19(c), in sales of timber with an appraised stumpage value exceeding $2,500 the contract forms approved by the Secretary must be used unless a special form for a particular sale or class of sales is approved by the Secretary. The approved forms provide flexibility to meet variable conditions, but essential departures from the fundamental requirements of such contracts shall be made only with the approval of the Secretary. Unless otherwise directed, the contracts shall require that the proceeds be paid by remittance drawn to the Bureau of Indian Affairs and transmitted to the Superintendent. Contracts may be extended, modified, or assigned subject to approval of the approving officer, and may be terminated by the approving officer upon completion.

[38 FR 24639, Sept. 10, 1973]

§ 141.13 Execution and approval of contracts.

(a) *Contracts for the sale of tribal timber.* All contracts for the sale of tribal timber shall be executed by the authorized representative of the tribe or tribal corporation. Contracts to be valid must be approved by the Secretary. There shall be included with the contract an affidavit executed by the appropriate officer of the tribe or tribal corporation setting forth the resolution or other authority of the governing body of the tribe or tribal corporation authorizing the sale.

(b) *Contracts for the sale of allotted timber.* Contracts for the sale of allotted timber shall be executed by the Indian owners or the Secretary acting pursuant to a power of attorney from the Indian owner, subject to conditions set forth in § 141.13(b) (1), (2), and (3). Contracts to be valid must be approved by the Secretary.

(1) The Secretary shall execute contracts on behalf of minors and Indian owners who are incompetent by reason of mental incapacity after consultation with any legally appointed guardian.

(2) The Secretary shall execute contracts for those persons whose ownership in a decedent's estate has not been determined or for those persons who cannot be located after a reasonable and diligent search and the giving of notice by publication.

(3) Upon the request of the owner of an undivided but unrestricted interest in land in which there are trust or restricted Indian interests, the Secretary shall include such unrestricted interest in a sale of the trust or restricted interests in the timber, pursuant to Part 141, and perform any functions required of him by the contract of sale for both the restricted and the unrestricted interests, including the collection and disbursement of payments for timber and the deductions as service fees from such payments of sums in lieu of administrative expenses.

[29 FR 14741, Oct. 29, 1964]

§ 141.14 Bonds required.

Performance bonds will be required in connection with all sales of Indian timber, except they may or may not be required, as determined by the approving officer, in connection with the use of timber by tribal enterprises pursuant to § 141.6, or in timber cutting permits issued pursuant to § 141.19. In sales in which the estimated stumpage value, calculated at the appraised stumpage rates, does not exceed $10,000 the bond shall be approximately 20 percent of the estimated stumpage value. In sales in which the estimated stumpage value exceeds $10,000 but is not over $100,000, the bond shall be approximately 15 percent of the estimated stumpage value but not less than $2,000; in sales in which the estimated stumpage value exceeds $100,000 but is not over $250,000, the bond shall be approximately 10 percent of the estimated stumpage value but not less than $15,000; and in sales in which the estimated stumpage value exceeds $250,000, the bond shall be approximately 5 percent of the estimated stumpage value but not less than $25,000. Bonds may be in the form of a corporate surety bond by an acceptable surety company; or cash bond designating the approving officer to act under a power of attorney; or negotiable United States Government bonds supported by appropriate power of attorney and performance bond.

[27 FR 12929, Dec. 29, 1962]

§ 141.15 Payments for timber.

The basis of volume determination for timber sold shall be the Scribner Decimal C, International ¼ inch, or International Decimal ¼ inch log rules, cubic volume, weight, or such other form of measurement as the Secretary shall designate for each sale. Payment for timber will be required in advance of cutting pursuant to § 141.16, except for Indian enterprises pursuant to § 141.6. Each advance deposit shall be at least 10 percent of the value of the minimum volume of timber required to be cut annually, figured at the appraised stumpage rates: *Provided*, That the approving officer may reduce the size of the last advance deposit before the completion of the sale or before periods of approximately 3 months or longer during which no timber cutting is anticipated. If a contract stipulates no minimum annual cutting requirements the amount of each advance deposit shall be determined by the approving officer. The advance payments that may be required in the sale of trust allotted timber, pursuant to § 141.16, shall not operate to reduce the size of advance deposits required by this section, but may postpone the necessity of requiring such deposits until the advance payments on the particular allotments being cut have been exhausted.

[27 FR 12929, Dec. 29, 1962]

§ 141.16 Advance payment for allotment timber.

Unless otherwise authorized by the Secretary, and except in the case of lump sum sales, contracts for the sale of timber from trust allotments shall provide for the payment of 25 percent of the stumpage value, calculated at the bid price, within 30 days from the date of approval and before cutting begins. Additional advance payments may be specified in contracts that are more than 3 years in duration; however, no advance payment will be required that would make the sum of such payment and of advance deposits and advance payments previously applied against timber cut from the allotment exceed 50 percent of the bid stumpage value. The advance payments shall be credited against the allotment timber as it is cut and scaled, at the stumpage rates governing at the time of scaling.

[38 FR 246: 9, Sept. 10, 1973]

§ 141.17 Time for cutting timber.

Unless otherwise authorized by the Secretary, the maximum period which shall be allowed, after the effective date of a timber contract, for cutting of the estimated volume of timber purchased shall be 5 years.

[24 FR 7872, Sept. 30, 1959]

§ 141.18 Deductions for administrative expenses.

In sales of timber from either allotted or unallotted lands, a reasonable deduction shall be made from the gross proceeds to cover in whole or in part the cost of managing and protecting the forest lands, including the cost of timber sale administration, but not including the costs that are paid from funds appropriated specifically for fire suppression or forest pest control. Unless special instructions have been given by the Secretary as to the amount of the deduction, or the manner in which it is to be made, there shall be deducted 10 percent of the gross amount received for timber sold under regular supervision, and 5 percent when the timber is sold in such a manner that little administrative expense by the Indian Bureau is required. Service fees in lieu of administrative deductions shall be determined in a similar manner.

(Act of April 30, 1964, 78 Stat. 186, 187)

[29 FR 14741, Oct. 29, 1964]

§ 141.19 Timber cutting permits.

(a) Except as provided in § 141.20, all timber cutting that is not done under formal contract, pursuant to § 141.12, shall be done under timber cutting permit forms approved by the Secretary. Permits will be issued only with

the consent of the Indian owner or the Secretary, for allotted lands, as authorized in § 141.13(b). Such consents to the issuance of cutting permits shall stipulate the minimum stumpage rates at which timber may be sold under permit.

(b) Free-use cutting permits may be issued for specified species and types of forest products by persons authorized under § 141.13 to execute timber contracts. Timber cut under this authority may be limited as to sale or exchange for other goods or services.

(c) An Indian having sole beneficial interest in an allotment may be issued an approved form of special permit to cut and sell designated timber from such allotment. The special permit shall include provision for payment by the Indian of administrative expenses pursuant to § 141.18. Unless waived by the Secretary, the permit shall also require the Indian to make a deposit with the Secretary to be returned to the Indian upon satisfactory completion of the permit or to be used by the Secretary in his discretion for planting or other work to offset damage to the land or the timber caused by the Indian's failure to comply with the provisions of the permit. As a condition to granting a special permit under authority of this paragraph, the Indian may be required to provide evidence acceptable to the Secretary that he has arranged a bona fide sale of the timber to be cut, on terms that will protect the Indian's interests. In special cases, the Secretary may authorize exceptions to the requirement of sole beneficial interest in an allotment.

(d) Permits to be valid must be approved by the Secretary. The stumpage value which may be cut in 1 calendar year by any individual under authority of paragraphs (a) and (b) of this section shall not exceed $2,500, but this limitation shall not apply to cutting under authority in paragraph (c) of this section. Essential departures from the fundamental requirements for issuance of special allotment timber cutting permits under authority of paragraph (c) of this section shall be made only with the approval of the Secretary.

[38 FR 24639, Sept. 10, 1973]

§ 141.20 Free-use cutting without permits.

(a) Timber may be cut by an Indian for his personal use from an allotment in which he holds the sole beneficial interest, without a permit or contract; but timber cut under this authority shall not be sold, or exchanged for other goods or services. Such cutting shall conform to the principles of conservative use as contemplated by § 141.4.

(b) With the consent of the authorized tribal representatives and the Secretary, Indians may cut designated types of forest products from unallotted lands without a permit or contract, and without charge. Timber cut under this authority shall be for the Indian's personal use, and shall not be sold or exchanged for other goods or services. Such cutting shall conform to the principles of conservative use as contemplated by § 141.4.

[24 FR 7872, Sept. 30, 1959]

§ 141.21 Fire protective measures.

The Secretary is authorized to hire temporary labor, rent fire fighting equipment, purchase tools and supplies, and pay for their transportation to extinguish forest or range fires. No expense for fighting a fire outside a reservation may be incurred unless the fire threatens the reservation, or unless such expense is incurred pursuant to an approved cooperative agreement with another forest protection agency. The rates of pay for fire fighters and for equipment rental shall be the rates for such fire fighting services that are currently in use by public and private forest fire protection agencies adjacent to Indian reservations on which a fire occurs, unless there are in effect at the time different rates that have been approved by the Secretary. The Secretary may enter into reciprocal agreements with any fire organizations, maintaining fire protection facilities in the vicinity of Indian reservations, for mutual aid in fire protection. This section does not apply to the rendering of emergency aid, or agreements for mutual aid, in fire protection pursuant to the act of May 27, 1959 (69 Stat. 66).

[24 FR 7872, Sept. 30, 1959]

§ 141.22 Trespass.

(a) Federal statutes provide that:

(1) Willful and unauthorized setting fire to timber, underbrush, or grass or other inflammable material upon any Indian reservation or lands belonging to or occupied by any tribe or group of Indians under authority of the United States, or upon any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, is punishable by fine of not more than $5,000 or imprisonment of not more than 5 years, or both.

(2) Whoever, having kindled or caused to be kindled, a fire in or near any forest timber, or other inflammable material on such lands, leaves said fire without totally extinguishing it, or permits such fire to spread beyond his control or leaves such fire unattended shall be fined not more than $500 or imprisoned not more than 6 months, or both.

(3) The unlawful cutting or wanton injury or destruction of trees standing, growing, or being upon such lands is punishable by fine of not more than $1,000 or imprisonment of not more than one year, or both.

(4) Section 1 of the act of June 25, 1948 (62 Stat. 787 (18 U.S.C. 1853)) provides penalties for the unlawful cutting of timber on Government lands and on Indian lands under Government supervision.

(b) The Secretary may mark and forbid the removal of timber from restricted or trust Indian lands or direct its removal to a point of safekeeping when he has reason to believe that such timber was unlawfully cut. Any such timber that can be positively identified as Indian trust property should be sold to prevent its deterioration. When any timber cut in trespass is found to be removed to land not under Government supervision, the owner of the land should be notified that such timber is Indian trust property and any further action should be upon advice of the Office of the Solicitor of the Department of the Interior. Any timber sold under this § 141.22 may be disposed of under the provisions of this Part 141 insofar as they are applicable. The Secretary may accept payment of damages in full in the settlement of civil trespass cases without resort to court action. The Secretary may also accept a recommended settlement per Solicitor's Regulations Manual I.4.1 when exercised in accordance with regulations contained in 344 DM 3.

All other matters relating to the collection of debts under this section will be in accordance with Departmental Manual, Part 344.

(25 U.S.C. 9)

[42 FR 40194, Aug. 9, 1977]

§ 141.23 Appeals under timber contracts.

Any action taken by an approving officer exercising delegated authority from the Secretary of the Interior or by a subordinate official of the Department of the Interior exercising an authority by the terms of the contract may be appealed to the Secretary of the Interior. Such appeal shall not stay any action under the contract unless otherwise directed by the Secretary of the Interior. Appeals will be filed in accordance with any applicable general regulations covering appeals. The Secretary shall notify the appropriate Indian tribal representatives upon receipt of an appeal by the purchaser, and shall notify the purchaser upon receipt of an appeal by the seller.

[24 FR 7872, Sept. 30, 1959]

PART 142—SALE OF LUMBER AND OTHER FOREST PRODUCTS PRODUCED BY INDIAN ENTERPRISES FROM THE FORESTS ON INDIAN RESERVATIONS

Sec.

Sec.
142.10 Payments, discounts, and credit sales.
142.11 Commission sales agents.
142.12 Deposits.

AUTHORITY: 54 Stat. 504, as amended; 5 U.S.C. 301, 41 U.S.C. 6b.

SOURCE: 27 FR 12929, Dec. 29, 1962, unless otherwise noted.

§ 142.1 Definitions.

As used in this part:

(a) "Secretary" means Secretary of the Interior or his authorized representative.

(b) "Forest products" means lumber, lath, shingles, crating, ties, bolts, logs, bark, pulpwood, or other marketable materials obtained from forests and authorized for removal by the Indian enterprises.

§ 142.2 Purpose of regulations.

The regulations in this Part 142 prescribe the terms and conditions under which forest products produced by Indian tribal enterprises from the forests of Indian reservations may be sold without compliance with section 3709 of the Revised Statutes.

§ 142.3 Applicability of regulations.

The regulations in this Part 142 are intended to be generally applicable except that they shall not apply to the Red Lake Reservation in Minnesota; or, as may be determined by the Secretary, to Indian enterprises that have entered into approved agreements for the use of tribal or allotted timber pursuant to § 141.6 of this chapter.

§ 142.4 Sale in open market.

The forest products obtained from the forests on Indian reservations by Indian enterprises may be sold in the open market at such prices as may be realized through the methods provided in this Part 142.

§ 142.5 Advertisement in trade journals and newspapers.

Forest products obtained from Indian reservation forests by Indian enterprises, may be advertised for sale in lumber trade journals of general circulation among persons, companies, or corporations interested in the buying and selling of forest products, and in newspapers in cities that may afford a favorable market for such forest products.

§ 142.6 Advertising, general.

Advertisement of forest products may also be made by circular letters and through personal interviews with the trade: *Provided*, That the travel expense incident thereto shall not be incurred without specific authority from the Secretary.

§ 142.7 Proposals for purchase.

Proposals for the purchase of forest products may be made to the Secretary, and he is authorized to quote prices and consummate sales at such times and/or such terms as are consistent with the regulations of this Part 142.

§ 142.8 Proposals to Government departments.

Proposals to sell may be made to municipalities, counties, states, or the United States and prices may be quoted to such agencies. Terms and payment in connection with such sales may be formulated in accordance with the general practice of such agencies.

§ 142.9 Cash sales.

All forest products of Indian forest enterprises shall be sold for cash f.o.b. mill or other point of delivery, except as provided in §§ 142.8 and 142.10. Adjustments and allowances on shipments of forest products after delivery to the buyer are authorized in accordance with generally accepted trade practices when such adjustments are essential by reason of off-grade shipments or errors in volume.

§ 142.10 Payments, discounts, and credit sales.

Shipments of forest products on open account shall be made only to persons or companies who have an acceptable credit rating. Credit on shipments of forest products sold on open account must not be extended beyond 60 days from date of receipt by the buyer. A cash discount in accordance with general trade practice and usually not exceeding two percent of mill value, may be allowed when the shipment is paid for within ten days of receipt by the consignee as evidenced by the original paid freight bill or other acceptable evidence.

§ 142.11 Commission sales agents.

Sales may be made through commission sales agents, for which they may be paid a commission on f.o.b. mill value of the shipment at approved rates. Sales may be made to wholesalers on which a discount at approved rates may be allowed.

§ 142.12 Deposits.

On all agreements to purchase for future delivery a deposit may be required. Such a deposit may be forfeited if the purchaser does not comply with the terms of sale. No agreement for sale and future delivery shall be made for a longer period than 90 days, except with the approval of the Secretary.

10. Amended Constitution and Bylaws of the White Mountain Apache Tribe of the Fort Apache Indian Reservation, Arizona (Excerpts)

. . .

PREAMBLE

We, the White Mountain Apache Tribe of the Fort Apache Indian Reservation, Arizona, in order to form a more representative organization, to exercise the duties and responsibilities of a representative tribal government, to conserve and develop our tribal lands and resources for ourselves and our children, to provide a higher standard of living, better home life and better homes within the reservation, to extend to our people the right to form business and other organizations, do adopt this Constitution and Bylaws as

a guide to our self-governing program.

ARTICLE I - STATEMENT OF PURPOSE

Section 1. In our relation to the United States Government, a relation similar to that which a town or a county has to a State and Federal Government, our own internal affairs shall be managed, insofar as such management does not conflict with the laws of the United States, by a governing body which shall be known as the White Mountain Apache Tribal Council.

ARTICLE II - TERRITORY

The authority of the White Mountain Apache Tribe, of Arizona, shall extend to all of the territory within the exterior boundaries of the Fort Apache Indian Reservation as established by the Act of Congress, June 7, 1897, and to such other lands as the United States may acquire for the benefit of the tribe, or which the tribe may acquire for itself.

. . .

ARTICLE V - POWERS OF THE COUNCIL

Section 1. In addition to all powers vested in the White Mountain Apache Tribal Council by existing law, the White Mountain Apache Tribal Council shall exercise the following powers, subject to any limitations imposed by the Constitution or the Statutes of the United States applicable to Indians or Indian tribes, and subject further to all expressed restrictions upon such powers contained in this constitution and bylaws:

(a) To represent the tribe and act in all matters that concern the welfare of the tribe, and to make decisions not inconsistent with or contrary to this Constitution and Bylaws of the

Constitution and Statutes of the United States applicable to Indians or Indian tribes.

(b) To negotiate, make and perform contracts and agreements of every description, not inconsistent with law or this Constitution and subject to the review and approval of the Secretary of the Interior where such review or approval is required by statute or regulation, with any person, association, or corporation, with any municipality or any county, or with the State of Arizona or the United States, including agreements with the State of Arizona for rendition of public services.

. . .

(e) To veto the sale, disposition, lease or encumbrance of tribal lands, interests in lands, tribal funds or other tribal assets that may be authorized by any agency or employee of the Government.

(f) To protect and preserve the wildlife, natural resources and water rights of the tribe, to regulate hunting and fishing on the reservation.

(g) To cultivate Indian arts, crafts, and cultures.

(h) To regulate the uses and disposition of tribal property.

(i) To manage all economic affairs and enterprises of the tribe including tribal lands, timber, sawmills, flour mills, community stores, and any other tribal activities.

(j) To accept grants or donations from any person, State or the United States.

(k) To appropriate tribal funds for tribal purposes and to expend such funds

in accordance with an annual budget approved by the Secretary of the Interior.

(l) To borrow money from any source and pledge or assign chattels or future tribal income as security therefor, subject to the review and approval of the Secretary of the Interior.

(m) To provide by ordinance for the assignment, use or transfer of tribal lands within the reservation.

(n) To enact ordinances subject to review and approval by the Secretary of the Interior covering the granting of both surface and subsurface leases for such periods as are permitted by law.

(o) To levy and collect taxes and to impose license fees, subject to review and approval by the Secretary of the Interior, upon members and non-members doing business within the reservation.

. . .

(q) To enact ordinances, subject to review and approval by the Secretary of the Interior, establishing and governing tribal courts and law enforcement among Indians on the reservation, regulating domestic relations of members of the tribe, but all marriages and divorces shall be in accordance with State laws, providing for appointment of guardians for minors and mental incompetents, regulating the inheritance of non-restricted real and personal property of members of the tribe within the reservation, and providing for the removal or exclusion from the reservation of any non-member of the tribe whose presence may be injurious to the people of the reservation.

(r) To enact ordinances governing the activities of voluntary associations

consisting of members of the tribe organized for purposes of cooperation or other purposes.

(s) To regulate its own procedures, to appoint subordinate committees, commissions, boards, advisory or otherwise, tribal officials and employees not otherwise provided for in this Constitution and Bylaws and to regulate subordinate organizations for economic and other purposes.

(t) The Tribal Council of the White Mountain Apache Tribe may exercise such further powers as may be delegated to the Council by members of the tribe or by the Secretary of the Interior, or any other duly authorized official or agency of the State or Federal Government.

(u) The foregoing enumeration of powers shall not be construed to limit the powers of the White Mountain Apache Tribe.

11. Ariz. Rev. Stat. § 28-1551 (1976)

In this article, unless the context otherwise requires:

. . .

4. "Highway" means any way or place in this state of whatever nature, open to the use of the public, for purposes of traffic, including highways under construction.

5. "In this state" means within the exterior limits of the state of Arizona and includes all territory within these limits owned by or ceded to the United States of America.

10. "Use" includes the placing of fuel into any receptacle on a motor

vehicle from which fuel is supplied for the propulsion of the vehicle unless the operator of the vehicle establishes to the satisfaction of the motor vehicle superintendent that the fuel was consumed for a purpose other than to propel a motor vehicle on the highways of this state, and, with respect to fuel brought into this state in any such receptacle, the consumption of the fuel in this state. A person placing fuel in a receptacle on a motor vehicle of another who holds a valid use fuel tax license is not deemed to have used the fuel.

11. "Use fuel" includes all gases and liquids used or suitable for use to propel motor vehicles, except such fuels as are subject to the tax imposed by article 1 of this chapter.

12. "User" includes any person who, within the meaning of the term "use" as defined in this article, uses fuel.

12. Ariz. Rev. Stat. § 28-1552 (1976)

Imposition of tax

For the purpose of partially compensating the state for the use of its highways, an excise tax is imposed at the rate of eight cents per gallon upon use fuel used in the propulsion of a motor vehicle on any highway within this state, such tax to be collected and remitted to this state or paid to this state as follows:

1. By a vendor, measured by the volume of use fuel:

(a) Delivered by him into the fuel tank of a motor vehicle not operated by him, or

(b) Used by him on the highways of this state in the propulsion of a motor vehicle operated by him.

2. By a user, measured by the volume of use fuel imported into this state or acquired without payment of tax to a vendor within this state, and used in the propulsion of a motor vehicle on the highways of this state.

3. The tax, with respect to fuel acquired by any fuel user in any manner other than delivery by a vendor into a fuel tank of a motor vehicle, shall attach at the time of the consumption of such fuel in the propulsion of a motor vehicle upon the highways of this state, and shall be paid over to the superintendent by the fuel user with the report required and in accord with other applicable provisions of this article.

13. Ariz. Rev. Stat. § 28-1556 (1976)

Presumption of Use

A. For the proper administration of this article, and to prevent evasion of the excise tax, it shall be presumed, until the contrary is established by competent proof under rules and procedures the superintendent adopts, that all use fuel received into any receptacle on a motor vehicle from which fuel is supplied to propel such vehicle, is consumed in propelling the vehicle on the highways of this state.

14. Ariz. Rev. Stat. § 40-601 (1974)

A. In articles 1 and 2 of this chapter, unless the context otherwise requires:

7. "Contract motor carrier of property" means any person engaged in the transportation by motor vehicle of property, for compensation, on any public highway, and not included in the term common motor carrier of property, and, for the purpose of taxation, the owner of any motor vehicle in excess of six thousand pounds unladen weight who leases, licenses or by any other arrangement permits the use of such vehicle by any other, other than a common or contract carrier subject to tax under articles 1 and 2 of this chapter, for the transportation of property upon the public highway for compensation or in the furtherance of any commercial or industrial enterprise.

8. "Motor carrier" means any common motor carrier of property or passengers, or any contract motor carrier of property or passengers.

9. "Motor vehicle" means any automobile, truck, truck tractor, trailer, semi-trailer, motor bus or any self-propelled or motor driven vehicle used upon any public highway of this state for the purpose of transporting persons or property, except farm tractors, implements of husbandry and other vehicles designed primarily for or used in agricultural operations and only incidentally operated or moved upon a highway, which shall be exempt from the provisions of this chapter.

11. "Public highway" means any public street, alley, road, highway or

thoroughfare of any kind used by the public, or open to the use of the public as a matter or right for the purpose of vehicular travel.

15. Ariz. Rev. Stat. § 40-641 (1974)

License tax upon motor carriers; collection; disposition

A. In addition to all other taxes and fees:

1. Every common motor carrier of property and every contract motor carrier of property shall pay to the state, on or before the twenty-fifth day of each month, a license tax of two and one-half per cent of the gross receipts from the carrier's operations within the state for the preceding calendar month, excluding receipts from property transported under a star route contract with the federal government. The gross receipts from the operation for hire by a common motor carrier of property or a contract motor carrier of property of a farm tractor or implements of husbandry exempt from registration, whether incidental to the operations as such motor carrier or otherwise, shall not be subject to the tax imposed by, or other provisions of, this article.

2. Every common motor carrier of passengers and every contract motor carrier of passengers shall pay to the state, on or before the twenty-fifth day of each month, a license tax of two and one-quarter per cent of the gross receipts from his operations within the state for the preceding calendar month.

B. When any carrier operates partly within and partly without the state, the

gross receipts of the carrier within the state shall be deemed to be all receipts of business beginning and ending within the state, and a proportion based upon the proportion of the mileage within the state to the entire mileage over which business is done, of receipts on all business passing through, into or out of the state.

C. Upon receipt of the taxes the department of transportation shall forthwith transmit them to the state treasurer, who shall credit them to the Arizona highway user revenue fund.

No. 78-1177

In the Supreme Court of the United States

OCTOBER TERM, 1978

WHITE MOUNTAIN APACHE TRIBE, ET AL.,
PETITIONERS

v.

ROBERT M. BRACKER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation of March 19, 1979.

QUESTION PRESENTED

Whether Arizona may impose a motor carrier license tax and a use fuel tax on a non-Indian enterprise whose activities occur exclusively on an Indian reservation and consist of felling, loading and trans-

porting within the reservation timber held by the United States in trust for the tribe.

STATEMENT

Petitioners are the White Mountain Apache Tribe, a federally recognized Indian tribe, and "Pinetop Logging Company," a business enterprise made up of two non-Indian corporations organized under the laws of Oregon. They brought this action in state court to challenge the applicability of Arizona's motor carrier license tax and use fuel tax to Pinetop's logging operations, which take place entirely on the White Mountain Apache Reservation. Respondents are the Arizona Highway Department, the Arizona Highway Commission, and individual members of each (Pet. App. 24a-1).[1]

Pinetop has a contract with the Fort Apache Timber Company (FATCO), the Tribe's business organization, for the management, harvesting, milling, and sale of tribal timber (Pet. App. 25a to 25a-1). The contract authorizes Pinetop to fell and load timber that is owned by the United States for the benefit of the tribe, and to transport it within the reservation to a tribal lumber mill (*ibid.*). In 1971, the Arizona Highway Department, pursuant to Ariz. Rev. Stat. Ann. § 40-641 (1974) and Ariz. Rev. Stat. Ann. § 28-1552 (Supp. 1978), sought to collect a motor carrier

[1] The First Amended Complaint also named the governor, the attorney general, the state corporation commission, and its members, but those defendants were subsequently dismissed (Pet. 12 n.5).

license tax equivalent to 2.5% of Pinetop's gross receipts from its common carrier operations and an excise tax in the amount of 8 cents per gallon of diesel fuel used in Arizona by Pinetop's motor vehicles (Pet. App. 26a).

After Pinetop paid the taxes under protest[2] it brought this action in state court for a refund, contending that Pinetop was immune from the state fuel tax and motor vehicle carrier gross receipts tax because its hauling activities took place exclusively on the reservation where Pinetop traveled on Tribal and BIA roads (Pet. 11).[3] The Tribe was subsequently named as a co-plaintiff when Pinetop filed an amended complaint (Pet. App. 1a-18a). Petitioners filed an affidavit by the manager of FATCO stating that when the contract between Pinetop and FATCO was negotiated, the parties believed that Pinetop would not be liable for state taxes, and that when Arizona attempted to levy these taxes FATCO was obliged to agree to reimburse Pinetop for any taxes it was required to pay in order to avoid the loss

[2] Between November 1971 and May 1976 Pinetop paid, under protest, $19,114.59 in use fuel taxes and $14,701.42 in motor carrier license taxes, and since that time it has continued to pay additional amounts under protest pending the outcome of the litigation (Pet. 11).

[3] In a few locations on the reservation Pinetop's vehicles travel on state highways. Pinetop has maintained records of the fuel attributable to the travel on these highways, and it concedes its liability for the tax attributable to that travel (Pet. 8, 11).

of Pinetop's services (Pet. App. 26a; A.R. 110-111).[4] The manager also stated that FATCO had five other logging contractors, and that FATCO would be obliged to reimburse them as well for any state taxes (A.R. 111).

The trial court granted summary judgment for the state defendants (Pet. App. 19a-23a), holding that the state taxes were lawfully imposed on Pinetop, and that Pinetop was not entitled to claim the "pulpwood exemption" from the common carrier license tax provided by Ariz. Rev. Stat. Ann. § 40-601(A)(10) (1974).

The Tribe and Pinetop appealed to the state court of appeals, which affirmed the trial court's conclusion that Pinetop was subject to the state taxes, but reversed the portion of the trial court's decision holding that Pinetop could not claim the pulpwood exemption, which the appellate court found to be applicable to 60% of Pinetop's gross revenues (Pet. App. 24a-33a). The state supreme court declined to review the intermediate appellate court's decision (Pet. App. 37a).

DISCUSSION

1. a. Petitioners' primary contention (Pet. 14-25) is that the state taxes in question are preempted

[4] "A.R." refers to the abstract of the record filed in the state intermediate appellate court. Despite the Tribe's contention that it would be obliged to reimburse Pinetop for any taxes owed, the state appellate court observed that although the Tribe was a "nominal party to this action," it had never paid any taxes nor had the state ever attempted to collect any taxes from it (Pet. App. 24a-1 n.1).

by the comprehensive federal regulation of the harvest and sale of tribal timber. As petitioners point out (Pet. 19-24), the United States holds title to all timber on reservation lands. Statutory authorization is required for the harvesting of timber on these lands, because the growing timber may be considered a portion of the fee interest, and its sale may constitute a realization of the major portion of value of the fee estate. Cf. *Squire* v. *Capoeman*, 351 U.S. 1, 10 (1956).[5]

General statutory authorization for the harvesting of mature timber on unallotted Indian land, pursuant to "the principles of sustained yield" and "under regulations to be prescribed by the Secretary," has been enacted, 25 U.S.C. 407, 466, in order to provide a source of tribal income as well as opportunities for Indian employment. See H.R. Rep. No. 1135, 61st Cong., 2d Sess. 3 (1910). The regulations prescribed by the Secretary pursuant to Section 407 state that the objectives of managing unallotted lands according to the principles of sustained yield include not only "[t]he preservation of such lands in a perpetually productive state," but also "[t]he development of Indian forests by the Indian people for the purpose of promoting self-sustaining communities, to the end

[5] See 1 G. Thompson, *Commentaries on the Modern Law of Real Property* §§ 97, 104 at 401-404, 439-440 (1964). In *Squire* v. *Capoeman, supra*, this Court held that 25 U.S.C. 348, which prohibits any "charge" or "encumbrance" on an allottee's interest, precluded the application of the federal capital gains tax to the proceeds of timber sales.

that the Indians may receive from their own property not only the stumpage value, but also the benefit of whatever profit it is capable of yielding and whatever labor the Indians are qualified to perform." 25 C.F.R. 141.3(a)(1), (3). Because of this pervasive federal regulation and strong federal interest in timber production on reservation lands, at least one lower court has concluded that state commercial law is preempted, and federal law governs timber contracts between tribal entities and lumber logging companies. *In re Humboldt Fir, Inc.*, 426 F. Supp. 292 (N.D. Cal. 1977).

Petitioners contend (Pet. 18) that here, as in *Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685, 691 (1965), the imposition of a state tax is preempted because it "would put financial burdens on" the non-Indian business or trader "in addition to those Congress or the Tribes have proscribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians * * *." Petitioners also urge (Pet. 9-10) that both the fuel tax and the motor carrier gross receipts tax are intended to compensate for the use of state owned and maintained highways; indeed Ariz. Rev. Stat. Ann. § 28-1552 expressly states that the fuel tax is imposed "[f]or the purpose of partially compensating the state for the use of its highways." Since the only taxes at issue here are those imposed in connection with Pinetop's use of roads constructed and maintained by the Tribe and BIA, for which no

state funds are expended (A.R. 102),[6] petitioners argue that here, as in *Warren Trading Post*, there is no reason to assume that the state has "the privilege of levying this tax" when it has "no duties or responsibilities." 380 U.S. at 691.

Finally, petitioners make the related contention (Pet. 34, quoting Pet. App. 31a) that the imposition of the state taxes impermissibly infringes on the Tribe's right to self-government because it conditions the Tribe's ability to use non-Indian assistance in harvesting the timber on the payment of the state taxes, adversely affects the Tribe's "economic development," and limits the Tribe's ability to "tax the same activities." The profits from the tribal timber enterprise constitute the primary source of tribal revenue. According to the affidavits petitioners filed in the trial court, FATCO's net profits in 1973 were $1,508,713, the lion's share of the total profits of $1,667,091 from all tribal enterprises (A.R. 98). Additionally, FATCO provided employment for approximately 300 members of the Tribe (*ibid.*).

b. Although this is the first case, to our knowledge, that presents the question whether the states' taxing jurisdiction is preempted by the federal regulation of timber harvesting on reservation lands, similar preemption claims based on *Warren Trading Post* and claims of interference with tribal self-government have been raised in a number of cases now pending before this Court and in the courts of appeals. The pending cases challenge the application

[6] See page 3 and note 3, *supra*.

of state transaction privilege taxes to monies paid by tribal enterprises for on-reservation services performed by non-Indians,[7] and to on-reservation sales by non-Indians to tribal enterprises,[8] the application of state cigarette and sales taxes to on-reservation sales by tribally licensed dealers to non-Indians,[9] and the application of state licensing fees to non-Indians hunting and fishing on reservation lands.[10] Despite

[7] In *Mescalero Apache Tribe* v. *Fred L. O'Chesky*, Nos. 77-2102, 77-2103 (10th Cir.), the Tribe contends that New Mexico cannot apply its transaction privilege tax to monies paid by the Tribe to non-Indian contractors for construction work performed on the reservation.

[8] An appeal from the judgment of the Supreme Court of Arizona is pending in *Central Machinery Co.* v. *State of Arizona*, No. 78-1604, on the question whether Arizona's transaction privilege tax may be applied to a BIA-approved on-reservation sale of farm machinery to an Indian tribe. And in *Navajo Tribal Utility Authority* v. *Arizona Department of Revenue*, No. 78-2895 (9th Cir.), the Tribe contends that the State may not impose its transaction privilege tax on the gross receipts from sales to a tribal entity of electricity that has been generated, transmitted, sold, and used solely within the reservation.

[9] In *State of Washington* v. *Confederated Tribes of the Colville Reservation*, No. 78-630, the Court has postponed further consideration of the question of jurisdiction and agreed to hear argument on the question whether Washington's cigarette and sales taxes are preempted or interfere with tribal self-government when these taxes are applied to on-reservation cigarette sales to non-Indians.

[10] A petition for a writ of certiorari is now pending in *North Carolina Wildlife Resources Commission* v. *Eastern Band of Cherokee Indians*, No. 78-1653, on the question whether the imposition of state fishing license fees to non-Indians for on-reservation fishing is preempted or interferes with tribal self-government.

significant differences—in the federal statutes and regulations relied upon to show pervasive federal regulation, and whether the Tribe has or has not attempted to impose its own taxes on the transaction [11] —the several cases are closely related.

The common bond is that, in each instance, the state is attempting to extend its taxing or regulatory jurisdiction to on-reservation transactions and activities in which the state has little or no interest and over which it exercises little or no control (though a non-Indian party is also involved). In the present case, for example, the state seeks to impose fuel taxes and motor carrier gross receipts taxes that are designed to repay the state for the use of its highways, though the non-Indian logging company travelled only on Tribal and BIA roads for which the state has no responsibility. Similarly, another state sought to impose a fishing license tax on persons who fish in reservation streams that have been stocked with fish

[11] In *State of Washington* v. *Confederated Tribes of the Colville Reservation, supra*, the Yakima Tribe imposed a tax of 2.25 cents per package of cigarettes, and the three-judge district court found that imposition of both the tribal tax and the state cigarette tax on sales to non-Indians would make cigarettes sold by tribal retailers too expensive to be competitive with cigarettes sold off the reservation. And in *North Carolina Wildlife Resources Commission* v. *Eastern Band of Cherokee Indians, supra*, where the tribal fishing license fee was $2.00, the state had eliminated one-day permits and required all fishermen to obtain a $5.50 state permit. As the court of appeals noted (588 F.2d 75, 77 (4th Cir. 1978)), "the combined fee of $7.50 for fishing permits for one day was a substantial deterrent to prospective fishermen."

hatched and raised by the federal government and placed in the reservation streams by federal agents in an attempt to provide the Tribe with a commercial fishing industry that will attract sport fishermen—the State having no conservation responsibility or other interest.[12]

The tribal enterprises in the cited cases provide a major source of tribal revenues. The claims of interference with tribal self-government, and to some extent the claims of preemption, are founded on the fact that the imposition of these state taxes—though technically imposed on the non-Indian parties to the transaction—is passed on to the tribal enterprise when it is the purchaser of goods or services, and will reduce revenues where the Tribe is the vendor, in some instances making the transactions so expensive that the Indian enterprise will be unable to compete with non-Indian enterprises. The imposition of state taxes also reduces the opportunity for the tribes themselves to impose similar types of taxes.

In our view, the question of the permissible limits of state taxation of on-reservation transactions involving non-Indians presents an important and frequently recurring issue that warrants resolution by this Court. None of the Court's previous decisions involves a situation where the economic burden of a tax nominally imposed on a non-Indian party will be

[12] See *North Carolina Wildlife Resources Commission* v. *Eastern Band of Cherokee Indians, supra.*

borne by the Tribe.[13] For example, in *Thomas* v. *Gay*, 169 U.S. 264, 275 (1898), the Court found that the burden of a tax on cattle owned by a non-Indian lessee of reservation lands was "too remote and indirect" to be regarded as a tax on the Indian lessors. And in *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, 481-482 (1976), the Court focused only on the claim that the burden of the state tax fell on the Indian cigarette retailers because they were required to collect the taxes at the time they made sales.

The instant case presents an appropriate vehicle to consider the reach of the states' taxing jurisdiction where the burden of the state tax falls on a tribal enterprise. Although the case was decided on summary judgment, the record includes a verified complaint, affidavits, and a deposition, all of which are to be taken as true in the present procedural posture of the case. Despite the fact that the state court suggested (Pet. App. 24a-1 n.1) that the Tribe was merely "a nominal party" because no taxes had been imposed on it, the verified complaint and the supporting affidavits allege that in order to secure Pinetop's continued services the Tribe had been ob-

[13] However, although the Court did not discuss this point in *Warren Trading Post*, the state court had upheld the application of the Arizona tax on the ground that its legal incidence fell on the trading post, not the Indian purchasers. *Warren Trading Post* v. *Moore*, 95 Ariz. 110, 113-114, 387 P.2d 809, 810-812 (1963). The Arizona tax considered in *Warren Trading Post* is the same tax now at issue in *Central Machinery Co.* v. *State of Arizona*, No. 78-1604, where the appellees likewise emphasize the fact that the legal incidence of the tax is not on the Tribe (Motion to Dismiss at 3-4).

liged to increase the contract payments to reimburse Pinetop for any state taxes it was required to pay (Pet. App. 9a; A.R. 111). Pinetop would also be required to do the same in the case of its other logging contractors (A.R. 111).

2. Petitioners also contend (Pet. 25-29) that Section 20 of the Arizona Enabling Act of 1910, ch. 310, 36 Stat. 569, which declares that Indian lands within Arizona shall be subject to the "absolute jurisdiction and control" of the federal government, deprives the state of regulatory jurisdiction and precludes the imposition of these taxes as a condition of using the Tribal and BIA roads to do business with the Tribe.[14]

In our view, this contention does not warrant review by this Court. In construing provisions of

[14] Finally, petitioners also contend (Pet. 30-33) that the imposition of the state tax conflicts with 25 C.F.R. 1.4(a), which states that, except as otherwise expressly provided, state laws "limiting, zoning, or otherwise governing, regulating, or controlling the use or development of any real or personal property" are not applicable to "property leased from or held or used under agreement with and belonging to any Indian or Indian tribe * * * that is held in trust by the United States * * *." The Secretary has never had occasion to consider the question whether a fuel tax or motor carrier tax on non-Indian vehicles operating on BIA or Tribal roads that are open to the public would constitute a state law "governing, regulating, or controlling the use or development" of tribal property. Certainly state motor carrier licensing and fuel tax laws were not within the Secretary's primary focus when he promulgated this regulation, which is aimed, at least in the main, at explicit land use control provisions such as zoning laws. So far as we can determine, this is the first case where petitioner's expansive construction of the regulation has been considered, and in our view this question does not—at least at present—warrant review by this Court.

other Enabling Acts that are virtually identical to Section 20 of the Arizona Enabling Act, this Court has made it clear that reservation lands are not wholly outside the jurisdiction of the states, because " 'absolute' federal jurisdiction is not invariably exclusive federal jurisdiction." *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 68 (1962), citing *Williams* v. *Lee*, 358 U.S. 217 (1959); *Draper* v. *United States*, 164 U.S. 240, 246 (1896). This Court's decisions "indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law." *Organized Village of Kake* v. *Egan, supra*, 369 U.S. at 75. The Arizona Enabling Act simply preserved the preexisting balance between state and federal jurisdiction. If the imposition of the state taxes at issue here is not preempted and does not interfere with tribal self-government, it does not contravene the Arizona Enabling Act.

CONCLUSION

The petition for a writ of certiorari should be granted, limited to questions 1, 2, and 5.[15]

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES W. MOORMAN
Assistant Attorney General

SARA SUN BEALE
Assistant to the Solicitor General

ROBERT L. KLARQUIST
JAMES J. CLEAR
Attorneys

JUNE 1979

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[15] For the reasons just stated, we agree with the appellant in *Central Machinery Co.* v. *State of Arizona*, No. 78-1604, that the applicability of the transfer privilege tax presents a substantial federal question, and accordingly probable jurisdiction should be noted. In order to have before it the several aspects of a common question, the Court may also deem it appropriate to grant certiorari in *North Carolina Wildlife Resources Commission* v. *Eastern Band of Cherokee Indians*, No. 78-1653, and to set the several cases for argument following *State of Washington* v. *Confederated Tribes of the Colville Reservation*, No. 78-630.

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APPENDIX

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 78-1177

WHITE MOUNTAIN APACHE TRIBE, et al.,

Petitioners,

-v.-

ROBERT M. BRACKER, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIVISION ONE

Petition for Certiorari Filed
December 29, 1978
Certiorari Granted October 1, 1979

I N D E X

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* "Pet. App." refers to the Appendix to the Petition for Writ of Certiorari filed December 29, 1978.

DOCKET ENTRIES

IN THE ARIZONA SUPERIOR COURT
MARICOPA COUNTY
Cause No. C-256110

Date — Description

December 8, 1971 - Complaint.

January 9, 1974 - Deposition of Leland A. Carpenter

February 1974 - (Exact date not stamped in Court files) - First Amended Complaint.

February 15, 1974 - Exhibits "A" & "B" Which Were Inadvertently Not Attached to First Amended Complaint (Schedule of taxes paid under protest).

February 26, 1974 - Answer to First Amended Complaint (Arizona Highway Commission and Arizona Highway Department Defendants).

February 26, 1974 - Answer to First Amended Complaint (Arizona Corporation Commission Defendants, Governor, and Attorney General).

March 8, 1974 - Motion for Partial Summary Judgment (by Arizona Highway Commission and Arizona Highway Department Defendants).

March 20, 1974 - Response to Defendants' Motion for Partial Summary Judgment and Plaintiffs' Motion for Partial Summary Judgment.

April 1, 1974 - Supplement to Plaintiffs' Motion for Partial Summary Judgment (attaching affidavits of Fred Banashley, Hal Butler, and Bud Mast).

April 1, 1974 - Response to Plaintiffs' Motion for Partial Summary Judgment (by Arizona Highway Commission and Arizona Highway Department Defendants).

April 8, 1974 - Hearing on Cross-Motions for Partial Summary Judgment.

April 12, 1974 - Response to Motion for Partial Summary Judgment (by Arizona Corporation Commission Defendants).

April 6, 1974, May 29, 1974, June 7, 1974, November 12, 1974, November 19, 1974, December 26, 1974, January 8, 1975 - Various supplemental memoranda on cross-motions for summary judgment.

February 27, 1975 - Further hearing on Cross-Motions for Partial Summary Judgment.

May 16, 1975 - Minute entry ruling denying Plaintiffs' Motion for Partial Summary Judgment and granting Defendants' Motion for Partial Summary

Judgment "to the effect that the State of Arizona may validly impose its use fuel and motor carrier license taxes against the plaintiff corporation".

May 28, 1975 - Order granting Defendants' Motion for Partial Summary Judgment entered (in conformity with minute entry ruling of May 16, 1975).

July 10, 1975 - Notice of Appeal from Order granting Defendants' Motion for Partial Summary Judgment and Notice of Posting Cash Bond for Costs on Appeal.

July 28, 1975 - Notice of Appeal from Order granting Defendants' Motion for Partial Summary Judgment, and Notice of Posting Cash Bond for Costs on Appeal.

July 29, 1975 - Designation of Contents of Record on Appeal.

July 30, 1975 - Deposition of Hal Butler.

April 9, 1976 - Pretrial Statement.

April 15, 1976 - Trial before the Court without a jury (on remaining state law issue).

May 20, 1976 - Minute entry ruling in favor of defendants and against plaintiffs upon trial of the case.

September 7, 1976 - Stipulation and Order Amending Pretrial Statement nunc

pro tunc.

September 7, 1976 - Judgment entered (in favor of defendants and against plaintiffs).

September 10, 1976 - Notice of Appeal, Waiver of Bond for Costs on Appeal, and Designation of Record on Appeal.

IN THE ARIZONA COURT OF APPEALS
DIVISION ONE
Cause No. 1 CA-CIV 3226

October 12, 1976 - Stipulation and Order consolidating appeals Nos. 1 CA-CIV 3226 and 1 CA-CIV 3619 under the primary number 1 CA-CIV 3226.

January 4, 1977 - Appellants' Opening Brief.

January 21, 19777 - Appellees' Brief.

February 7, 1977 - Stipulation and Order Suspending Appeal (revesting jurisdiction in superior court to allow settlement as between plaintiffs and the Arizona Corporation Commission Defendants and the Governor and the Attorney General).

February 9, 1977 - Letter from Clerk of the Court of Appeals to Clerk of the Superior Court transmitting Stipulation and Order Suspending Appeal.

IN THE ARIZONA SUPERIOR COURT
MARICOPA COUNTY
Cause No. C-256110

March 29, 1977 - Stipulation and Order ordering as follows:

1. Vacating the Judgments of May 28, 1975 and September 7, 1976 insofar as they pertain to the Arizona Corporation Commission Defendants, the Governor, and the Attorney General.

2. Granting said defendants leave to file an amended Answer to the First Amended Complaint.

3. Granting plaintiffs leave to voluntarily dismiss this action without prejudice as against said defendants.

March 3, 1977 - First Amended Answer to First Amended Complaint (by Corporation Commission Defendants, Governor, and Attorney General).

March 29, 1977 - Notice of Partial Voluntary Dismissal Without Prejudice.

IN THE ARIZONA COURT OF APPEALS
DIVISION ONE
Cause No. 1 CA-CIV 3226

April 29, 1977 - Stipulation and Order for Partial Dismissal of Appellees (dismissing appeal as against

Corporation Commission Defendants, Governor, and Attorney General).

March 10, 1978 - Order entered for substitution of parties (substituting successors in office for various appellees).

March 13, 1978 - Oral argument before the Court of Appeals.

June 29, 1978 - Order filing the Opinion of the Court of Appeals and Opinion of the Court of Appeals rendered.

July 14, 1978 - Motion for Rehearing.

July 27, 1978 - Appellees' Response to Motion for Rehearing.

August 28, 1978 - Order denying Motion for Rehearing.

September 6, 1978 - Petition for Review (by the Arizona Supreme Court).

IN THE ARIZONA SUPREME COURT
No. 13962-PR

October 4, 1978 - Order denying Petition for Review.

IN THE SUPREME COURT OF THE UNITED STATES
No. 78-1177

December 29, 1978 - Petition for Writ of Certiorari.

October 1, 1979 - Order granting Petition for Writ of Certiorari, limited to Questions 1, 2 and 5 presented by the Petition.

ARIZONA SUPERIOR COURT
MARICOPA COUNTY

WHITE MOUNTAIN APACHE TRIBE, an Indian tribe established pursuant to Executive Order, et al.,	)	No. C256110
Plaintiffs,	)	[Filed March 29, 1974]
vs.	)	
JACK WILLIAMS, Governor of the State of Arizona, et al.,	)	
Defendants.	)	

AFFIDAVIT

STATE OF ARIZONA)
) ss
COUNTY OF NAVAJO)

HAL BUTLER, being first duly sworn upon oath, deposes and says:

He is presently the Manager of Fort Apache Timber Co. (FATCO) and has occupied that post or a similar post since 1963 when FATCO started logging and mill operations. The initial investment was the result of loans from the United States Government and all the operations were to occur exclusively within the boundaries of the Fort Apache Indian Reservation.

The Fort Apache Indian Reservation has a total area of 1,664,872 acres of which 720,000 are commercial forest. Presently there is approximately 300,000 acres of timber being utilized by selective cutting on a sustained yield basis. This means that under the supervision of the United States Forest Service an area can be recut every 20 years without destroying the forest or damaging the watershed, an important factor, since the reservation supplies about 35% of the water to the densely populated center portion of Arizona.

FATCO is wholly owned by the White Mountain Apache Tribe. All profits belong to the Tribe, but accumulated profits cannot be distributed until the obligations to the United States Government have been satisfied in full. After these obligations have been paid, however, all profits will be available to the Tribe for either re-investment, or health, education and welfare programs.

Presently, FATCO employees approximately 300 Indians in various phases of its operation. An additional 50 to 100 Indians are employed by the six companies FATCO has contracted with to perform the logging and hauling of timber. Pinetop Logging Company, as one of these loggers,

employs at least 50 tribal members in its operations.

Although FATCO is a wholly owned enterprise of the Tribe, the Tribe realizes present income from FATCO's operations by the receipt of stumpage payments for the timber processed. As was stated above, further benefits are realized by the Tribe through FATCO profits, although as explained earlier, these profits cannot be distributed by FATCO before the obligations to the U. S. Government have been satisfied.

The lumbering operations could be outlined as follows:

I. Trees are marked by the BIA Forestry Dept.

II. We fall the trees, they are cut to proper size, skidded, and decked.

III. Logs are loaded onto trucks and transported to our mill.

IV. A log is classified as either pulp wood or a saw log and are manufactured accordingly. Approximately 60% of the timber coming to the mill is pulp wood (except for Cibeque operation).

Operations II and III above are performed entirely by contractors such as Pinetop Logging. Step IV and the selling of lumber is performed by FATCO.

The responsibilities and duties of FATCO and the loggers are enumerated in contracts with the White Mountain Apache Tribe containing provisions prescribed by the Bureau of Indian Affairs. Many of FATCO's responsibilities have been passed on to loggers, such as Pinetop, through separate contracts.

An example of these responsibilities is the provision, contained in all the contracts, requiring that the logger should maintain all roads in proportion to its share of use. More specifically all the contracts provide that during any periods in which a logger or FATCO uses existing Reservation roads, they shall maintain such roads in proportion to its share of use, as determined by agreement between FATCO and the BIA Superintendent. In the even there is a disagreement, the final determination is made by the Superintendent.

The Superintendent polices the activities of FATCO and the loggers, and dictates when repairs on roads and other reservation improvements shall be made. By contract, FATCO and the loggers are given permission to use existing reservation improvements, such as roads, subject to applicable regulations promulgated by BIA and such other conditions as the Superintendent may impose.

FATCO and the loggers have, over the past ten years, expended substantial amounts each year to maintain Tribal and BIA roads as required by the Superintendent. Pinetop, for example, has separate personnel and equipment dedicated solely to road maintenance.

Pinetop is paid for delivered product. Only part of its gross receipts are the result of receipts due to hauling. Only a small portion of the hauling is done on Arizona STATE Highways. A high percentage of Pinetop's receipts from hauling is expended to construct new roads and maintain existing Tribal and BIA roads as required by the Superintendent.

One of the principal factors considered by both Pinetop and FATCO in negotiating a contract price for logging operations was the costs to be incurred by Pinetop in carrying out that operation. At the time we agreed on a price in 1971 it was not believed the State could impose use fuel and motor carrier tax on Pinetop since it would be, in effect, a tax on the Tribe. Subsequent to the States attempt to levy the tax, FATCO has agreed to bear the burden of such taxes instead of losing Pinetop as a contractor.

There are presently six contractors working for FATCO, and FATCO will have to

pay any taxes imposed on those contractors through higher costs for logging. This may force us to do our own logging.

The tribe has attempted its own logging operations at its small saw mill in Cibeque, however, it has proven to be uneconomical and we will be forced to change that operation.

DATED this 22 day of March, 1974.

/s/ Hal Butler

(Jurat omitted in printing)

AFFIDAVIT

STATE OF ARIZONA)
) ss
COUNTY OF NAVAJO)

BUD MAST, being first duly sworn upon oath, deposes and says:

That he is the head forester in charge of the Forestry Dept. of the Bureau of Indian Affairs. That in said position he supervises the marking, cutting and hauling of timber by FATCO and its contractors on the Fort Apache Indian Reservation.

Through contractual agreements the Forestry Dept. controls and determines which and how much timber will be cut by FATCO and its contractors. The Forestry

Dept. also determines where and when roads will be built by FATCO and its contractors such as Pinetop.

Also the Forestry Dept., through the Superintendent of the Bureau of Indian Affairs, has the power to, and does, dictate to both FATCO and its contractors to make repairs to and maintain existing BIA and Tribal roads.

Both FATCO and its contractors have all agreed by written contract to repair existing improvements on the reservation according to their use of those improvements. Improvements include roads and the Superintendent has the authority to order either FATCO or any of its contractors to maintain or repair any of the roads used by them. The contractor's only recourse is to the Area Director of the BIA if he is aggrieved by any decision of the Superintendent.

Only a small percentage of a loggers travel is done over Arizona State Highways. In theory the State is supposed to maintain its own roads, but some of that maintenance is done by the BIA or the Tribe. The State of Arizona contributes absolutely nothing to the maintenance or repair of Tribal or BIA roads. No State men, equipment or money have, to my knowledge, ever been expended or utilized on BIA or Tribal roads.

Very extensive rules and regulations have been promulgated by the BIA incompassing all aspects of forest utilization and management, including extensive rules and regulations governing in detail the planning, engineering, construction, maintenance and general regulation of all roads used by loggers. Aspects not covered specifically by the Federal Regulations have been covered through contracts with the logging companies. The provisions in those contracts are proscribed by the BIA and all of the contracts must be approved by the BIA. Through contracts the logging companies are forced to expend substantial funds each year to construct, maintain, and repair BIA and tribal roads used by them in their logging operations.

DATED this 26th day of March, 1974.

/s/ Bud Mast

(Jurat omitted in printing)

AFFIDAVIT

STATE OF ARIZONA)
) ss
COUNTY OF NAVAJO)

FRED BANASHLEY, being first duly sworn upon oath, deposes and says:

That he is the Chairman of the White Mountain Apache Tribal Council, which,

under the Tribes Constitution is the governing body of the Tribe.

That the Tribal Council has the power under its constitution to levy and collect taxes and to impose license fees, subject to review and approval by the Secretary of the Interior, upon members and non-members doing business within the boundaries of the Fort Apache Indian Reservation.

In the past the Council has not and still sees no reason to levy taxes or license fees on contractors such as Pinetop. Any such tax would only fall directly on the Tribe through higher logging costs and would in effect be a tax on ourselves since all of the profits made by FATCO are the property of the Tribe.

FATCO's operations are extremely important to the entire White Mountain Apache Tribe. Besides providing employment for some 300 tribal members and stumpage payments providing yearly income for the Tribe, the Company showed a net profit for 1973 of $1,508,713 when all of the Tribal Enterprises together showed a profit of only $1,667,091.

The profits earned by FATCO must be accumulated and cannot be distributed to the Tribe until the full amount of obligations due the United States Government

have been paid. The Tribe presently relies on stumpage payments from FATCO for its yearly existence. For example, for the year 1973 the total budgeted income for the total tribe was $1,522,107, included in that sum is FATCO's stumpage payment of $1,150,000 plus forestry fees in the amount of $110,940. For the year 1972 total income budgeted was $1,404,817, budgeted to be received from stumpage payments from FATCO was $1,150,000. It can easily be seen how important FATCO and the timber industry is to the 6500 tribal members. All of FATCO's operations are carried on exclusively within the boundaries of our reservation. No funds or aid of any kind has been received by the Tribe from the State of Arizona for construction, maintenance, or repair of any BIA or Tribal roads.

DATED this 25th day of March, 1974.

/s/ Fred Banashley

(Jurat omitted in printing)

ARIZONA SUPERIOR COURT, MARICOPA COUNTY

EXHIBIT A TO [DEFENDANTS'] MOTION FOR PARTIAL SUMMARY JUDGMENT

[Filed March 7, 1974]

* * * *

13(a) THE CONTRACTOR and his subcontractor(s), hereinafter called CONTRACTOR shall at all times during the life of this contract, carry and maintain liability insurance under the Workman's Compensation Law and under the Occupational Liability Disease Law of the State of Arizona. The CONTRACTOR shall comply with all provisions of the Federal Wage and Hour Law and shall make all payments due or to become due under the Federal and State Social Security Laws under the Unemployment Compensation Law, tax laws, or any other laws now in effect or that may be enacted hereafter, affecting the employees of the CONTRACTOR, and the products, materials and equipment belonging to or under the control of the CONTRACTOR. The CONTRACTOR further agrees to furnish the COMPANY, on demand, receipted bills or other satisfactory proof showing that the payments required under the said Social Security, Unemployment Compensation and tax laws have been made as and when due throughout the life of this contract.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO. 78-1177

WHITE MOUNTAIN APACHE TRIBE, et al.,

Petitioners,

vs.

ROBERT M. BRACKER, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS DIVISION ONE

ROBERT K. CORBIN
Attorney General

By IAN A. MACPHERSON
Assistant Attorney General
338 State Capitol
Phoenix, Arizona 85007
Attorneys for Respondents

IN THE

SUPREME COURT OF THE UNITED STATES

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STATUTES

OTHER AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

NO. 78-1177

WHITE MOUNTAIN APACHE TRIBE, et al.,

Petitioners,

vs.

ROBERT M. BRACKER, et al.

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE ARIZONA COURT OF APPEALS
DIVISION ONE

RESPONDENTS' BRIEF IN OPPOSITION

I
THE STATE TAXES IN QUESTION
HAVE NOT BEEN PREEMPTED
BY FEDERAL LAW

The initial argument advanced by the Petitioners is that 25 U.S.C. §§ 196, 406 and 407 (1976) and 25 C.F.R. §§ 141 and 142 preempt the application of the state tax laws in question (i.e., A.R.S. §§

28-1552 and 40-641). The contention of the Petitioners is that these statutes and regulations exclusively govern all aspects of the timbering operations of the Fort Apache Timber Company ("FATCO"), thereby ousting the state from imposing its taxes upon an independent logging contractor, Pinetop Logging Company ("Pinetop"), a non-Indian entity with which FATCO had contracted for certain logging and hauling services.

At the outset it must be remembered that the Petitioners herein are composed of two legally distinct and separate entities. One entity is the White Mountain Apache Tribe of Indians, which Indian tribe created the tribal business enterprise, FATCO. The other entity is an independent logging contractor operation composed of two non-Indian Oregon corporations doing business jointly as Pinetop Logging Company. The state taxes in

question are neither imposed nor are they sought to be imposed upon either the White Mountain Apache Tribe or FATCO; on the contrary, the only taxpayers in this dispute are the non-Indian Oregon corporations, E. H. Loveness Lumber Sales Co. and Basin Building Materials Co., doing business jointly herein as Pinetop.

Accordingly, the pertinent inquiry becomes: do the federal statutes and regulations cited by the Petitioners clearly evince a congressional or federal executive intent to forbid the imposition of state taxes upon non-Indian independent logging contractors who have agreed with an Indian tribal timbering operation to perform certain services for it? It is the Respondents' position that numerous decisions of this Court require the conclusion that the state laws in question are not preempted even if it be assumed that the economic burdens of the taxes in

question -- as distinguished from their legal incidence -- are eventually borne by the Indian entity herein.

To begin with, the statutes relied upon by the Petitioners deal with the sale or other disposition of dead timber (25 U.S.C. § 196) and the sale of timber on Indian trust allotments (25 U.S.C. § 406) and on unallotted lands (25 U.S.C. § 407). The C.F.R. provisions, in turn, concern general forest regulations (25 C.F.R. § 141) and the sale of lumber and other forest products produced by Indian enterprises from the forests on Indian reservations (25 C.F.R. § 142).

Although the Petitioners point to these provisions as being the source of their preemption argument, they offer little more than generalized assertions that the federal scheme prohibits the state laws in question. The thrust of

their arguments appears to be that, since the laws and regulations seek to protect the forests on Indian reservations to foster sustained yields, state laws which could in any way affect that objective, directly or indirectly, must be prohibited.

The Respondents respectfully disagree. As pointed out in the lower court's opinion herein (Petition, Appendix at 30a-1 -- 31a), the federal laws upon which the Petitioners rely do not seek to exclusively control the licensing of non-Indian independent contractors such as Pinetop, do not seek to directly regulate the prices charged for services such as Pinetop renders (although the contracts are subject to federal approval) nor do they seek to tax the operations of non-Indian contractors such as Pinetop. In short, the federal scheme

preempts an area other than that to which the state laws in question are sought to be applied. Thus, these state tax laws should be permitted continued operation in the absence of a clear and affirmative manifestation by the Congress of an intention to prohibit them. DeCanas v. Bica, 424 U.S. 351, 357 (1976); Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware 414 U.S. 117, 139 (1973); Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424, 430 (1963); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141 (1963); Commonwealth of Pennsylvania v. Nelson, 350 U.S. 497, 505 (1956); Schwartz v. Texas, 344 U.S. 199, 203 (1952).

Therefore, the cornerstone of the Petitioners' preemption argument -- Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685 (1965) -- is not controlling in this case. There, this

Court found that the federal regulatory scheme under 25 U.S.C. §§ 261 et seq. and 25 C.F.R. §§ 251.1 et seq. was so all-pervasive that those engaged in the business of Indian trading on an Indian reservation could not be subjected to Arizona's transaction privilege tax. Nothing in the Warren Trading Post decision, supra, suggests, however, that since the licensed Indian trader itself was subjected to preemptive federal regulation, non-Indians with whom the trader contractually dealt were similarly immune from the application of state laws which affected them alone. It was the business of Indian trading on Indian reservations that constituted the preempted area and not the entire area of state taxation of non-Indians vis a vis their own independent activities thereon.

This point has been made clear in subsequent decisions of this Court, chief among which is Moe v. Confederated Salish

and Kootenai Tribes, 425 U.S. 463 (1976). There, this Court held, inter alia, that the State of Montana could impose its cigarette tax -- the legal incidence of which was upon the vendee -- upon sales by an Indian "smoke shop" operator to non-Indian consumers of the cigarettes. This ruling was reached in spite of the Indians' assertions that the entire area had been preempted under the rationale of the Warren Trading Post case, supra, and that the adverse economic effects occasioned by a state "precollection" requirement not only violated that rationale, but constituted in addition a frustration of and interference with tribal self-government under Williams v. Lee, 358 U.S. 217 (1959).

In rejecting that contention, this Court correctly observed that in the Warren Trading Post case, supra, there

was no claim made that the Arizona tax could not be applied to on-reservation transactions between the licensed Indian trader and non-Indians. See 425 U.S. at 482; 380 U.S. at 686 n.1. This is a relevant point, for it acknowledges that even where there has purportedly been a complete and absolute preemption of an area (e.g., engaging in the business of Indian trading on an Indian reservation), activities not clearly embraced within the excluded area continue to be subjected to state laws (e.g., taxation of a licensed Indian trader with respect to his transactions with non-Indians), even though this might in some way affect the preempted area.

This conclusion was also reached by the United States Solicitor's Office of the Department of the Interior in two opinions cited with approval by this Court in the Warren Trading Post case,

supra, 57 I.D. 124 and 58 I.D. 562. See 380 U.S. at 690 nn. 15, 16.

In point of fact, 57 I.D. 124 states at 126:

> "...[W]hite traders in their dealings with non-Indians must comply with the State laws, including those imposing sales taxes. ...Traders on Indian reservations who are non-Indians are, in my opinion, required to take out licenses under the Arizona laws in question to carry on trade with non-Indians on the reservation, and must account to the State authorities for sales taxes on so much of their business as is done with non-Indians."
>
> (Emphasis added.)

Accordingly, the question of whether or not, as the Petitioners argue, the federal Indian timber regulatory scheme is so all-pervasive as to exclude the application of the state taxes herein is not as easily answered as the Petitioners would suggest. Clearly, while there is a federal objective of fostering and promoting Indian forestry programs, such an

objective is neither frustrated nor impeded by permitting the continued application of the state taxes in question to the operations of the non-Indian taxpayer herein, Pinetop Logging Co.

Indeed, the Moe and Warren Trading Post decisions, supra, have acknowledged the applicability of state sales taxes to on-reservation transactions between a federally licensed Indian trader and non-Indians. In so doing, it is the Respondents' position that this Court continues to recognize the necessity of examining not only the scope of the subject area allegedly being preempted, but also, insofar as state taxation is concerned, the distinction between the legal incidence of a tax and the ultimate resting place of its economic burden.

In this regard, the lower court's reliance upon this Court's decision in Commonwealth of Pennsylvania v. Nelson,

supra, is entirely proper. In addition, although the lower court cited the decision in its discussion of other aspects of the case, the holding in Kahn v. Arizona State Tax Commission, 16 Ariz. App. 17, 490 P.2d 846 (1971), appeal dismissed (for want of substantial federal question) 411 U.S. 941 (1973)[1] is relevant on the preemption issue.

In the Kahn case, supra, this Court's dismissal for want of a substantial federal question constituted both a ruling on the merits, Hicks v. Miranda, 422 U.S. 332 (1975), and a view of this Court that the judgment appealed from was correct as

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1. It should be noted that the dismissal occurred on April 23, 1973, nearly one month after March 27, 1973, the date when this Court handed down its decisions in Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) & McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973). These cases, therefore, may reasonably be presumed to have been fresh in the Court's mind when the Kahns' appeal was dismissed.

to those federal questions raised and necessary to the decision, State of Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, ___ U.S. __, __ S.Ct. __ (47 U.S.L.W. 4111, 4115 n. 20, Jan. 16, 1979). Apart from the question of the precedential weight to be accorded the Kahn decision, supra, the dissent of Mr. Justice Douglas, in which Mr. Justice Brennan concurred, 411 U.S. at 941-944, is enlightening.

In the lower court, the Kahn non-Indian marital community argued, among other things, that since Mr. Kahn earned all of his income as an attorney for the Navajo Tribe of Indians and was thus subject to assertedly all-pervasive statutes and the rules and regulations of the U.S. Secretary of the Interior, federal law had thus preempted the imposition of Arizona's income tax upon him. Justices

Douglas and Brennan dissented from the summary dismissal and argued that probable jurisdiction should have been noted and that full argument and briefing should have been permitted.

The basis for the dissent was that Mr. Kahn's employment was controlled by 25 U.S.C. § 81 (governing contracts with Indian tribes or Indians) and was subject to extensive and comprehensive regulation by the U.S. Secretary of the Interior under 25 C.F.R. §§ 72.1--72.25 (regulating contracts between attorneys and Indian tribes). Constructing an analogy between 25 U.S.C. § 81 and 25 C.F.R. §§ 72.1-- 72.25, and the preemptive regulatory scheme found in the Warren Trading Post case, supra, the dissent argued that similar policy considerations should control in Mr. Kahn's situation. A majority of this Court nevertheless ruled that no

substantial federal question had been presented with respect to any of the issues raised by the appeal, including the contention that the federal statutes and regulations preempted the application of the state tax to the non-Indian, Edmund D. Kahn.

It is therefore the position of the Respondents herein that the Petitioners have failed to demonstrate that the statutes and regulations heretofore cited by them preempt the state tax laws in question. Moreover, the Petitioners have thus also failed to show that the lower court's ruling on the federal question of substance has not heretofore been determined by this Court or that the lower court's ruling was probably not in accord with applicable decisions of this Court within the meaning of 28 U.S.C., U.S. Supreme Court Rule 19(1)(a).

On the contrary, the Respondents view

the holdings in the Moe and Kahn decisions, supra, and in particular the basis of the dissent in the dismissal of the Kahn case, supra, as persuasive authority for the position that the substantive legal question -- the purported preemption of state tax laws imposed upon non-Indians who contract with on-reservation Indian tribes or individual Indians -- has been heretofore considered by this Court and resolved in favor of the application of the state law.

Furthermore, the Respondents believe that the lower court decision has properly considered the substantive question against a background of numerous federal decisions on point and has rendered a decision that is clearly in accord with applicable decisions of this Court. See, e.g., Fort Mojave Tribe v. County of San Bernardino, 543 F.2d 1253 (9th Cir. 1976), cert. denied 430 U.S. 983 (1977);

Agua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d 1184 (9th Cir. 1971), cert. denied 405 U.S. 933 (1972), rehrg. denied 405 U.S. 1033 (1972), motion for leave to file second petition for rehearing denied 409 U.S. 901 (1972); cf. Mescalero Apache Tribe v. O'Cheskey, 439 F.Supp. 1063 (D.N.M. 1977),[2] wherein it was held that non-Indian contractors building a resort complex for an Indian tribe on its reservation were subject to the New Mexico gross receipts tax over the contention that federal law governing the regulation of traders preempted the area and that tribal business licensing and tax ordinances further precluded the state taxes. The district court, citing, among others,

2. Appeals pending in the U.S. Court of Appeals for the Tenth Circuit, Cause Nos. 77-2102 and 77-2103, oral argument scheduled for March 16, 1979.

the Moe, Fort Mojave and Agua Caliente decisions, supra, rejected the notions that the state taxes had been preempted and that the economic burdens of the taxes borne by the Indians infringed upon their rights of self-government.[3]

With regard to the Petitioners' reliance upon the decision in Humboldt Fir, Inc. v. United States, 426 F.Supp. 292 (D.Cal. 1977) (Petition at 15 n.7), the reliance is misplaced. There, the district court held that the United States could file a claim in bankruptcy on behalf of the Hoopa Valley Indian Tribe to recover against the bankrupt estate of Humboldt Fir, Inc., for the breach of a timber sale contract. While the court

3. The economic burdens of the non-Indians' taxes were borne by the Indians pursuant to contractual agreement and not by mandate of state law, it should be noted. See 439 F.Supp. at 1066.

held that the federal law of contracts applied to the agreement between the tribe and the bankrupt, it did not rule that the type of preemption advocated by the Petitioners herein resulted. The court held, 426 F.Supp. at 296-298, that both federal law (25 U.S.C. §§ 406, 407) and California state law (California Commercial Code, i.e. West's Ann. Cal. Codes, Commercial §§ 1101 et seq.) were relevant to the inquiry into whether the Indian tribe had reasonably relied upon the bankrupt's repudiation of the contract under U.C.C. § 2-609.4 and to an examination of the effect of the bankrupt's failure to avail itself of available administrative appeal rights under 25 C.F.R. §§ 2.2, 2.3 and 141.23.

The Respondents herein would respectfully submit that the policy considerations underlying the rights of an Indian tribe seeking damages from a bankrupt for

breach of a timber sale contract bear little relevance to the instant controversy. The present dispute concerns the application of state tax laws to non-Indians who have entered with Indians into presumably valid, binding, federally-approved contracts that are not being breached, but are being performed according to their terms.

The holding in the Humboldt Fir case, supra, establishes that a non-Indian bankrupt may not manipulate state commercial law to the detriment of an Indian tribe otherwise in compliance with applicable federal and state laws. It does not hold, as Petitioners seem to suggest, that a complete ouster of state laws, including tax laws, is required under 25 U.S.C. §§ 406 or 407 or 25 C.F.R. §§ 2.2, 2.3 or 141.23. If such a result were intended, the district court judge would not have had occasion to discuss in

detail, as he did, the provisions of the Uniform Commercial Code, particularly with respect to the circumstances which justified a conclusion that the bankrupt had repudiated the contract.

As for the Petitioners' reliance upon the decisions cited in note 8, page 19 of the Petition, the Respondents would respectfully submit that each is distinguishable from the present dispute. For example, in Confederated Tribes of the Colville Indian Reservation v. Washington, 446 F.Supp. 1339, 1371 (D. Wash. 1978), the court held, inter alia, that where an Indian tribe possessed the power to impose a sales tax on transactions other than cigarette sales (which were taxed under a tribal cigarette tax ordinance) between Indian vendors and non-Indian vendees, but had not actually imposed such a tax, the state's power to tax was not preempted. In the present

case, there is no suggestion that, as in the Colville decision, supra, an Indian tribal tax code touching upon the same subject matter has been enacted and actually put into operation.

To be sure, while it is the Respondents' position that, under the decisions in the Fort Mojave and Agua Caliente cases, supra, the result reached in the Colville case, supra, with respect to state taxation of cigarette sales to non-Indians is questionable under this court's decision in the Moe case, supra, the fact remains that no conflicting or purportedly preemptive tribal tax exists herein. Thus, the Colville decision, supra, is of limited assistance to the resolution of the question.[4]

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4. The Colville decision, supra, is presently pending on appeal in the U.S. Supreme Court, Docket No. 78-630.

In Santa Rosa Band of Mission Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975), cert. denied 429 U.S. 1038 (1977), the court concluded that county zoning ordinances could not co-exist with the federal policy that the states (and their political subdivisions) had no power to regulate the Indian use or governance of reservation lands except as specifically declared by Congress. Notably, the court cited (532 F.2d at 658 n.2) the decision in McClanahan v. Arizona State Tax Commission, supra, and interpreted it to mean

> " ...that states may not regulate or tax Indian use of the reservation absent Federal consent. The Court [in McClanahan, supra,] distinguished state efforts to regulate off-reservation Indian activities, or reservation activities of non-Indians, from state efforts to tax or regulate Indian use of the reservation, holding the latter preempted by the grant of the reservation." (Emphasis added.)

In the McClanahan decision, supra, this Court specifically narrowed its

ruling to the issue of the applicability of a state tax directly imposed upon a tribal member residing on her own reservation and earning all of her income thereon. It was also recognized that, under decisions such as Thomas v. Gay, 169 U.S. 264 (1898) and Utah & Northern Ry. Co. v. Fisher, 116 U.S. 28 (1885), this Court was not extending its examination to exertions of state sovereignty over non-Indians who undertake activity on Indian reservations.

Finally, the Petitioners' reliance upon Confederated Tribes of the Colville Indian Reservation v. State of Washington, 412 F.Supp. 651 (E.D. Wash. 1976) is misplaced, for the ruling is distinguishable from the present case. There, the State of Washington was attempting to regulate the precise activity of non-Indians sought to be governed by tribal ordinances, viz. hunting and fishing on

an Indian reservation. Such a fact situation is clearly lacking in the present case. Moreover, an opposite conclusion was reached (i.e., permitting the application of state hunting and fishing laws to non-Indians on Indian reservations) in People of the State of California v. Quechan Tribe of Indians, 424 F.Supp. 969 (D.Cal. 1977)[5] and, notably, White Mountain Apache Tribe v. State of Arizona, No. CIV 77-867 PHX-WPC (D. Ariz., June 13, 1978).[6]

It is therefore the position of the Respondents that the state taxes here in question are properly applied to the non-Indian independent logging contractor, Pinetop Logging Company, and have not been shown to have been preempted.

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5. Appeal pending in the U.S. Court of Appeals for the Ninth Circuit, Docket No. CIV 77-1500, oral argument held January 11, 1979.

6. Appeal pending in the U.S. Court of Appeals for the Ninth Circuit, Docket No. CIV 78-3427.

Neither Congress nor the executive branch has acted in the clear and manifest fashion required to support the conclusion of preemption advocated by the Petitioners. Thus, upon the foregoing authorites, the Petitioners' preemption argument should fail and the petition for certiorari should be denied.

II

THE ARIZONA ENABLING ACT DOES NOT PROHIBIT THE STATE TAXES IN QUESTION

The second argument offered by the Petitioners is that Arizona's Enabling Act, 36 Stat. 557, 560, § 20 (Petition, Appendix at 43a - 44a) forbids the imposition of the taxes herein upon Pinetop.

The answer to this contention is that the lower court correctly held that the disclaimer language contained in the Act operates as a disclaimer of property interest rather than a relinquishment of all jurisdiction over persons and activi-

ties, of whatever nature, on an Indian reservation. Rather than being in conflict with the decisions of this Court, as suggested by the Petitioners, the conclusion is clearly correct with respect to state exertions of jurisdiction over non-Indians and their activities on Indian reservations. See Moe v. Confederated Salish and Kootenai Tribes, supra, 411 U.S. at 481 - 483; Kahn v. Arizona State Tax Commission, supra, 411 U.S. at 941 - 944; Thomas v. Gay, supra. See also Truscott v. Hurlbut Land & Cattle Co., 73 F. 60 (9th Cir. 1896); Mescalero Apache Tribe v. O'Cheskey, supra; Arizona Department of Revenue v. Hane Construction Co., 115 Ariz. 243, 564 P.2d 932 (Ct.App. 1977); G. M. Shupe, Inc. v. Bureau of Revenue, 89 N.M. 265, 550 P.2d 227 (1976); Chief Seattle Properties, Inc. v. Kitsap County, 86 Wash.2d 7, 541 P.2d 699 (1975). Cf. Organized Village

of Kake v. Egan, 369 U.S. 60 (1962).

The Petitioners seek to characterize the state taxes herein as constituting a direct regulation of and burden upon tribal lands. The Petitioners' reliance in this regard upon the McClanahan decision, supra, and the discussion of the Arizona Enabling Act therein (411 U.S. at 175-176) is particularly inapposite. This Court made it clear that its ruling, in view of the Act, was reached upon the grounds that the legal incidence of the state tax there in question was sought to be imposed not upon a non-Indian on the reservation (cf. Kahn v. Arizona State Tax Commission, supra) but directly upon an enrolled Indian member of the Navajo Tribe.

The Petitioners' argument that the disclaimer of "absolute jurisdiction and control" over Indian lands in the Act requires the invalidation of the taxes

herein is a plain non sequitur: the taxes in question do not seek to regulate or control any Indian lands whatsoever. They seek only to tax the operations of a non-Indian entity which has entered into a contract with an Indian tribe to perform services on the tribe's reservation within the State of Arizona. Neither of the taxes herein is a property tax nor does either tax relate to Indian lands.

As the lower court pointed out (Petition, Appendix at 28a-1 -- 29a), insofar as the Arizona Enabling Act is concerned, it is as immaterial that Pinetop's business activities are conducted on an Indian reservation as it would be were they conducted on national forest lands. Wilson v. Cook, 327 U.S. 474 (1946).

Thus, the Petitioners' contention that Arizona's Enabling Act prohibits the taxes is legally unsound and should result in the rejection of the contention and the denial of the petition for certiorari.

III

25 C.F.R. § 1.4 DOES NOT PROHIBIT THE STATE TAXES HERE IN QUESTION

The Petitioners' next argue that 25 C.F.R. § 1.4 (Petition, Appendix at 44a -- 45a) prohibits the subject taxes. The Petitioners misconstrue the regulation at the outset by urging that the taxes herein constitute "...laws ...governing, regulating or controlling the use or development of...real or personal property..." within the purview of the regulation.

It is the Respondents' position that the lower court correctly ruled that 25 C.F.R. § 1.4 did not operate to oust the state taxes herein as levied upon Pinetop's activities. In addition, the Respondents would point out that several commentators have suggested that 25 C.F.R. § 1.4 is invalid for want of spe-

cific statutory authorization[7] and at least two district courts have refused to apply it for that reason. See Norvell v. Sangre De Cristo Development Co., Inc., 372 F.Supp. 348 (D.N.M. 1974), rev'd on other grounds[8] 519 F.2d 370 (10th Cir. 1975); Rincon Band of Mission Indians v. County of San Diego, 324 F.Supp. 371 (D. Cal. 1971), rev'd on other grounds, 495

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7. C. Goldberg, "Public Law 280: The Limits of State Jurisdiction over Reservation Indians," 22 U.C.L.A. Law Rev. 535, 586 n. 229; M. Price, "Law and the American Indian," 290-293 (1973 ed.)

8. Of interest in this regard is the Court of Appeals' footnote 2, 519 F.2d at 373:

> "25 C.F.R. § 1.4 authorizes the Secretary of the Interior to adopt particular State statutes, codes, regulations, rules or other regulations in order to provide complementary leasing of Indian land with adjacent State land."
>
> (Emphasis added.)

There is thus no suggestion as a result of the reversal that an intent to oust state taxation of non-Indians is embraced in 25 C.F.R. § 1.4.

F.2d 1 (9th Cir. 1974), cert. denied 419 U.S. 1008 (1974).

In spite of these authorities, the Court of Appeals for the Ninth Circuit has ruled that 25 C.F.R. § 1.4 is valid and operated to prevent the application of Kings County, California zoning ordinances and building codes on the Santa Rosa Rancheria, an Indian reservation. Santa Rosa Band of Mission Indians v. Kings County, supra. Since the case involved a direct attempt by the state authorities to regulate Indian use of Indian trust lands (i.e., two individual Indians could not, without complying with certain county ordinances, place their mobile homes (purchased with federal approval) on their lots), the ruling is less than surprising.

The relevance of the decision, however, lies in an examination of its analysis of 25 C.F.R. § 1.4 vis a vis state

laws other than those dealing with land use and zoning. While the court held that the county ordinances there in question would constitute an "encumbrance" upon reservation trust lands and were thus prohibited not only by 25 C.F.R. § 1.4 but also by 28 U.S.C. § 1360(b) (California being a "P.L. 280" state), it specifically negated any inference that its ruling could be extended to the extent advocated by the Petitioners in the case sub judice. The court stated, 532 F.2d at 667 n.20:

> "We need not decide the full dimensions of the 'no encumbrance to trust property' exception, as we are certain in any event that the regulation's proscription of the local zoning ordinances involved here falls well within it, and is hence not in derogation of the statutory grant. Nevertheless, it has been suggested that the word

> "encumbrance" might be interpreted so broadly as to eliminate state regulation of all activity occurring on trust property. See Goldberg, at 587. We note that 25 C.F.R. § 1.4 is conceivably subject to the same objection. As we read "encumbrance," it is directed, consonant with the flavor of the word's narrow legal meaning, at traditional land use regulations and restrictions directed against the property itself, and does not encompass regulations of activity which only incidentally involve the property. See Rincon, supra, at 376-377. However, the full dimensions of the statutory exception, and the validity of 25 C.F.R. § 1.4 when asserted in other contexts as a bar to state jurisdiction, must await determination on a case-by-case basis." (Emphasis added.)

The Respondents herein would respectfully submit that the decision in Fort Mojave Tribe v. County of San Bernardino, supra, which reaffirmed the reasoning of Agua Caliente Band of Mission Indians v. County of Riverside, supra, is precisely the type of "case-by-case" analysis to which the court in the Santa Rosa case, supra, was referring. In point of fact,

at the time that the Agua Caliente case, supra, was decided in the district court (i.e., 1969), 25 C.F.R. § 1.4 had been promulgated and had been adopted and made applicable to those portions of the Agua Caliente Indian Reservation situated within the city limits of Palm Springs, California. See M. Price, supra at 291. Indeed, although it does not appear in the reported decisions, the Agua Caliente Band specifically argued, as do the Petitioners herein, that 25 C.F.R. § 1.4 preempted the California possessory interest tax (California Revenue and Tax Code § 107) levied upon non-Indian lessees of tribal lands. [9]

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9. See Brief of Appellee at 41-43, United States Court of Appeals for the Ninth Circuit, Cause No. 25298, the Agua Caliente Band of Mission Indians, et al. v. The County of Riverside.

If 25 C.F.R. § 1.4 operated to oust the states from jurisdiction to tax non-Indians with respect to their business activities on Indian reservations, one would assume that the U.S. Court of Appeals for the Ninth Circuit would not, after rendering in 1975 its decision in the Santa Rosa case, supra, have upheld the California possessory interest tax (California Revenue and Tax Code § 107) as imposed upon the non-Indian lessees in its Fort Mojave decision, supra, handed down in 1977. The more reasonable conclusion to be drawn, therefore, is that, as the court observed in its footnote 20 in the Santa Rosa decision, supra, while 25 C.F.R. § 1.4 preempts conflicting state and county land use and zoning regulations, the intent of the regulation, insofar as it forbids "encumbrances" in a way similar to that of 28 U.S.C. § 1360(b), "...does not encom-

pass regulations of activity which only incidentally involve the property."

In this regard, it was held in Parker Drilling Co. v. Metlakatla Indian Community, 451 F.Supp. 1127 (D.Alas. 1978) that 25 C.F.R. § 1.4 would not prohibit the application of state tort law to permit a suit by the owner of an aircraft which was damaged when it hit a snow berm at an airport owned and operated by an Indian community corporation if the Indian corporation, as distinguished from the Metlakatla Indian Community itself, could be shown to be the actual owner and operator of the airport. The court denied both the Indians' and the aircraft owner's motions for summary judgment on the grounds that fact questions surrounding the actual operation of the airport precluded such a procedure.

Yet, the court's holding, 451 F.Supp. at 1141, that the action could have been

maintained in state court and that the imposition of tort liability would not fall within the ambit of the area preempted by 25 C.F.R. § 1.4 clearly supports the Respondents' position herein. Quite simply, 25 C.F.R. § 1.4 is devoid of any provision which manifests even a vague executive intent to preempt the application of the state taxes herein to the non-Indian logging company, Pinetop. On the contrary, the decisions in the Santa Rosa, Fort Mojave and Agua Caliente decisions, supra, support just the opposite conclusion.

For these reasons, the Petitioners' third argument should be rejected and the petition for certiorari should be denied.

IV

THE STATE TAXES HEREIN DO NOT INFRINGE UPON THE TRIBAL GOVERNMENT

The Petitioners' final argument asserts that the state taxes herein infringe upon the right of tribal self-government under the rationale of Williams v. Lee, supra. There is a simple answer to this contention: they do not.

To begin with, the Petitioners characterize the lower court's synopsis of Pinetop's position (Petition, Appendix at 31a -- 31a-1) as an "acknowledgment" of specific impairments of governmental freedoms claimed by the White Mountain Apache Tribe (Petition at 33). The lower court did nothing more than describe the Indians' claims and correctly concluded that the purported interferences were "...more imaginary than real." (Petition, Appendix at 31a). In reality, the Petitioners' arguments in this regard run

counter to the great weight of authority on point.

For example, this Court specifically ruled in the Moe decision, supra at 483, that the Montana requirement that the Indian tribal cigarette vendor "precollect" the state tax with respect to his sales to non-Indians (who bore the legal incidence of the tax) did not constitute the type of burden which would frustrate tribal self-government under Williams v. Lee, supra, or run afoul of any congressional enactment dealing with the affairs of reservation Indians, citing United States v. McGowan, 302 U.S. 535 (1938) and Thomas v. Gay, supra. This rationale is clearly correct as applied in cases which by now are quite familiar herein. See, e.g. Kahn v. Arizona State Tax Commission, supra; Fort Mojave Tribe v. County of San Bernardino, supra; Agua Caliente Band of Mission Indians v.

County of Riverside, supra; Mescalero Apache Tribe v. O'Cheskey, supra.

The fact that the economic burdens of a state tax may in some way affect an Indian or an Indian tribe on its reservation does not, without more, compel the conclusion that the state tax is invalid. In Makah Indian Tribe v. Tax Commission, 72 Wash.2d 613, 434 P.2d 580, (1967), appeal dismissed (for want of substantial federal question) 393 U.S. 8 (1968), the Washington Supreme Court held that the fact that a Washington cigarette tax imposed upon non-Indians resulted in an elevation of the cost of the cigarettes when later sold to reservation Indians did not constitute an impermissible intrusion upon Indian commerce. The court stated, 434 P.2d at 581:

> "A statement made in Minot v. Philadelphia, Wilmington and Baltimore Railroad Company et al., 85 U.S. (18 Wall) 206, 232, 21 L.Ed. 888 (1873), referring to the congressional power over interstate commerce, is instructive here.

> 'The tax imposed by the act in question affects commerce among the States and impedes the transit of persons and property from one State to another just in the same way, and in no other, that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the thing taxed. That taxation produces this result of itself constitutes no objection to its constitutionality. As was very justly observed by this court in a recent case, "Every tax upon personal property, or upon occupations, business, or franchises, affects more or less the subjects, and the operations of commerce. Yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution."'" (Emphasis added.)

The rationale applies with equal force here: simply because the parties to the contract, Pinetop and FATCO, may negotiate the consideration underlying the agreement, including the numerous cost components such as, for example, the economic burdens of the state taxes in question which go into Pinetop's charge, does

not mean that the tax components -- any more than other cost components such as fuel costs, labor expenses and the like -- are an impermissible intrusion upon either Indian commerce or the right of the Indians to make their own laws and be ruled by them. At the very most, the contractual arrangement by which Pinetop agreed to render logging and hauling services to FATCO and, in return, by which FATCO agreed to pay Pinetop, is simply a manifestation of the exercise by FATCO and/or the Indian tribe of the very right of self-government upon which it is contended the state is infringing.

At this juncture, the Petitioners offer that the "anti-infringement" criteria espoused under the McClanahan and Williams cases, supra, is "...meant to protect Indian governments from illness as well as from funerals." (Petition at 35). The thrust of this observation, ap-

parently, is that the increased economic burdens being "shifted" to the tribe pursuant to contract doctrine (as distinguished, it must be noted, from any mandate of state law) are, while relatively insubstantial (cf. "illness" and "funerals"), still impermissible. This result is, again apparently, based upon the premise that, if the state taxes were not imposed upon Pinetop, the cost of Pinetop's services to FATCO would be a few percentage points lower.

This species of argument has been frequently advanced in the past and has been just as frequently rejected, not only in the context of dealings between non-Indians and the "sovereign" Indian tribes, but in situations involving private individuals and the sovereign United States Government. See, e.g., Moe v. Confederated Salish and Kootenai Tribes, supra, Kahn v. Arizona State Tax Commis-

sion, supra; United States v. City of Detroit, 355 U.S. 466 (1958); State of Alabama v. King & Boozer, 314 U.S. 1 (1941); United States v. State of New Mexico, 581 F.2d 803 (10th Cir. 1978); Fort Mojave Tribe v. County of San Bernardino, supra; Agua Caliente Band of Mission Indians v. County of Riverside, supra; Mescalero Apache Tribe v. O'Cheskey, supra; Arizona Department of Revenue v. Hane Construction Co., supra.

If it is the Petitioners' contention that the contract document between Pinetop and FATCO effectuates an impermissible "shifting" of the economic burdens of the state taxes from Pinetop to FATCO, the remedy for such a circumstance is reformation of the contract, not a lawsuit such as the present one. On the other hand, if it is the Petitioners' position that the economic burdens of these taxes are being borne by the Indian entity

FATCO on a strictly voluntary as opposed to a negotiated contract basis, then the result should be governed by Mescalero Apache Tribe v. O'Cheskey, supra.

In summary, the Petitioners have failed to demonstrate the type of concrete interferences with the Indians' rights of self-government to warrant the conclusion that the state taxes herein imposed upon Pinetop are in violation of the principles articulated in Williams v. Lee, supra. Any effect that the taxes may have upon the Indians is not only remote and indirect, it arises not from any mandate of state law but from contract doctrines existing between Pinetop and FATCO. Such a tenuous cause and effect relationship cannot reasonably be said to require invalidation of the taxes herein.

V

CONCLUSION

For all of the foregoing reasons, the Respondents would respectfully submit that this Court should, in the exercise of its discretion, deny the Petitioners' Petition for Writ of Certiorari.

Respectfully submitted this 23rd day of February, 1979.

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Attorney General

IAN A. MACPHERSON
Assistant Attorney General

CERTIFICATE OF SERVICE

I am the attorney for the Respondents and am a member of the bar of this Court. I hereby certify that I caused three copies of the foregoing Respondents' Brief in Opposition to Petition for Writ of Certiorari to be hand delivered on February 23, 1979 to:

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All parties required to be served have been served.

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IAN A. MACPHERSON
Assistant Attorney General

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1177

WHITE MOUNTAIN APACHE TRIBE, et al.,

Petitioners,

vs.

ROBERT M. BRACKER, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE ARIZONA COURT OF APPEALS
DIVISION ONE

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. THE STATE TAXES ARE PREEMPTED BY COMPREHENSIVE FEDERAL REGULATION OF TRIBAL TIMBER.

Respondents' Brief in Opposition discusses at length the law of federal preemption as it applies to federal statutory schemes other than federal regulation of tribal timber, but it is virtually devoid of discussion of how the application of these state taxes to the White Mountain Apache Tribe's timber operation will in fact affect this federal regulatory scheme. The Respondents do seem to concede that that is the crucial inquiry, for in one place in their Brief they contend:

> "Clearly while there is a federal objective of fostering and promoting Indian forestry programs, such an objective is neither frustrated nor impeded by permitting the continued application of the state taxes in question to the operations of the non-Indian taxpayer herein, Pinetop Logging Co." (Brief in Opposition, pp. 10-11)

The Petition for Certiorari outlines exactly how application of the state taxes will frustrate or impede the federal objective of fostering

and promoting Indian forestry programs. (Petition, pp. 22-25)

The financial consequences of state taxation are highly relevant considerations in any question of federal preemption of state taxes. The federal policies embodied in the timber regulations are the development of reservation-based economies for the employment of Indian peoples, the continuous production of a perpetual forest business for the benefit of the Indians, providing to the Indians "the benefit of whatever profit" the forest is capable of yielding, the preservation of "the recreational or aesthetic value of the forest to the Indians," and "the preservation or development of grazing, wildlife and other values of the forest to the extent that such action is in the best interest of the indians." 25 C.F.R. § 141.3 (1978)

The draining of revenues out of tribally operated forestry programs for the construction of off-reservation state highways detracts from all of these federal objectives. Rather than rebut Petitioner's contentions of actual and specific disruption of the federal objectives by these state taxes, Respondents simply refuse to discuss those actual adverse effects.

II. THE ARIZONA ENABLING ACT.

The Arizona Enabling Act deprives the State of Arizona of regulatory jurisdiction over Indian tribal trust land itself. 36 Stat. 557, 560 (1910), cf. Draper v. United States, 164 U.S. 240, 247 (1896). Taxation of tribal agents for the privilege of using tribal lands in the tribe's own business is plainly an assertion of regulatory authority over the tribal lands.

In any event, the question whether imposition of these taxes should be characterized as state regulation of tribal lands is itself a question of federal law. First Agricultural

National Bank v. State Tax Commission, 392 U.S. 339, 346-47 (1968).

Respondents' Brief in Opposition declines to discuss whether the application of these state taxes in this case constitutes forbidden state regulation of tribal lands. Rather, the respondents simply invoke the lower court's self-serving state-law ruling that the formal incidence of the tax is upon the non-Indian agent of the tribe. Respondents argue the taxes do not run afoul of the Arizona Enabling Act provided they are not denominated as property taxes. (Brief in Opposition p. 29) Thus, the Respondents suggest that state regulation of tribal lands by any other name is not state regulation of tribal lands. Petitioners submit to the contrary that the statutes of the Congress are not so impotent and that the states are not permitted to levy taxes forbidden by federal law on the simple ruse of saying they are some other kind of taxes.

III. 25 C.F.R. § 1.4

By its plain language, 25 C.F.R. § 1.4 should apply to prohibit these state taxes on the use of Indian roads and on the hauling of Indian timber on the reservation. The Respondents' Brief in Opposition offers no argument whatsoever that the literal meaning of the regulation would not prohibit the taxes in question. Instead, the Respondents argue that the regulation is invalid as applied to prohibit these taxes.

Questions over the validity of 25 C.F.R. § 1.4, which has been increasingly used in the litigation of jurisdictional disputes between tribes and states, have troubled many of the lower courts. The standard for determining the validity of the regulation in any particular situation is properly stated by the Ninth Circuit in Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (1975), a case relied upon by the Respondents. The Ninth Circuit

there upheld § 1.4 as barring state regulation of mobile home use on reservation land acquired under the Indian Reorganization Act of 1934, 25 U.S.C. § 465. The Ninth Circuit stated the standard of validity as follows:

> "Rule-making authority for the 'management of all Indian affairs and of all matters arising out of Indian relations' is conferred by 25 U.S.C. § 2; 25 U.S.C. § 9 delegates rule-making authority to 'effect the various provisions of any act relating to Indian affairs ...' It has been held that neither provision grants general regulatory powers to the Secretary of the Interior; to be valid a regulation must be reasonably related to some other specific statutory provision. See Organized Village of Kake v. Egan, supra, 369 U.S. at 63, 82 S.Ct. 562; United States Department of the Interior, Federal Indian Law 56-57 (1966); Cohen, Handbook of Federal Indian Law 102-103 (1945). We think 25 U.S.C. § 465, which authorizes the Secretary to purchase land for the 'purpose of providing land for Indians' and to take the title to such lands in trust, when read against the history of Federal policy governing use and control of Indian trust property, is sufficient to sustain the regulation as it applies to the Rancheria lands, obtained pursuant to § 465." 532 F.2d at 665-666.

The Ninth Circuit also suggested that 25 C.F.R. § 1.4 may not even require specific

statutory basis as applied to prohibit state regulation of use of reservation lands. 532 F.2d at 666 n. 19.

Thus, the validity of 25 C.F.R. § 1.4 in any particular situation depends on the background of federal law and legislation concerning both the specific state in question and the subject matter of the particular jurisdictional dispute between the tribe and the state. For example, § 1.4 would have considerably lesser scope in a "P.L. 280" state like California than in a state like Arizona which as assumed no jurisdiction over Indian reservations. Cf. McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973).

The touchstone of the validity of § 1.4 in this case is, as the Ninth Circuit has said, whether the regulation is "reasonably related to some other specific statutory provision." The Arizona Enabling Act is a specific federal statutory provision speaking to the authority

of the state and of the United States over Indian reservation lands in the state of Arizona. That statute says that "absolute jurisdiction and control" shall remain in the federal government. Therefore, 25 C.F.R. § 1.4 is valid insofar as it implements the Arizona Enabling Act by making clear that the State of Arizona may not tax the use or development of reservation lands or of reservation timber, even by a non-Indian.

Since the Respondents offer no real defense of the lower court's disregard of the plain language of 25 C.F.R. § 1.4 and since their alternative attack on the validity of the regulation is clearly unmeritorious when the regulation is read together with the Arizona Enabling Act, the lower court's error in refusing to apply § 1.4 is obvious. The adverse consequences of this precedent for Indian people in many states make it appropriate for this court to correct that error.

IV. THE STATE TAXES IMPERMISSIBLY INFRINGE ON TRIBAL GOVERNMENT.

The Respondents' position is that no state taxation of non-Indians can ever run afoul of the infringement doctrine, no matter what the specific effect of such taxation is upon tribal government. The Respondents propose a "per se" rule that the doctrine against infringement of tribal government can never be invoked to strike down application of a state tax where the formal incidence of the tax is upon the person or property of a non-Indian. (Brief in Opposition, pp. 39-46)

Petitioners do not claim any general immunity of non-Indians from state taxation of their affairs on Indian reservations, but it is possible that in some situations state taxation of non-Indians could interfere with tribal government. The Arizona Court of Appeals refused to consider the particularized effects of the challenged taxes on the White Mountain Apache Tribe's governmental freedom, thus

emasculating the infringement doctrine wherever state intrusion into tribal affairs is done on the pretext of regulating non-Indians.

The mode of analysis actually contemplated by the infringement doctrine is more subtle than that. A major decision published since the Petition for Certiorari was filed well illustrates the proper application of the infringement doctrine to state regulation and taxation of non-Indians. In Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Commission, 588 F.2d 75 (4th Cir. 1978), the Fourth Circuit held that the doctrine against infringement of tribal government prevented the state from applying its fishing regulations to and exacting its fishing license fees from non-Indians who fish on reservation streams stocked entirely by the Tribe and by the federal government. The state had no part at all in this purely commercial fishery operation by the Tribe. The Court held:

> "If we were required to reach the second part of the Williams test, we would readily find that the state's regulation frustrates and impedes one major goal of tribal self-government, financial self-sufficiency. This case is quite different from Moe v. Salish & Kootenai Tribes, supra, where the Court was careful to stress the imposition of state sales tax borne by non-Indians on the reservation did not frustrate tribal self-government. Imposition of North Carolina's license requirement would impair the Band's attempts to manage its own affairs by curbing its revenues and reducing the receipts of many of its members doing business with tourists.
>
> . . . .
>
> . . . [W]e can conceive of no possible interest of North Carolina in this purely commercial undertaking, while the stocking of the streams and the licensing of visiting fishermen by the Band is an established program of the Bands from which the Tribe itself and its members derives substantial economic benefits, benefits which are greatly diminished by North Carolina's enforcement of its own fishing licensing laws." 588 F.2d at 78-79.

Significantly, the Fourth Circuit does not uphold a general immunity of non-Indians from state fishing regulations on Indian reservations but rather upholds an immunity in the particular circumstances of the case before it under which

the state can show "no possible interest" in intruding into and taxing non-Indian participation in the Tribe's "purely commercial undertaking."

That same detailed examination of the specifics of this case should lead to the same conclusion here. The State of Arizona has no conceivable interest in taxing the use by the Tribe through its agents of tribally-owned, built, and maintained roads, especially where the state highway taxes in question are not in any way used to support the tribal roads.

The fact that the analysis and result of the Arizona Court of Appeals in this case is starkly in conflict with the recent analysis and holding of the Fourth Circuit in Eastern Band of Cherokee Indians again highlights the fundamental error in the Arizona court's interpretation of the infringement doctrine. That error has ramifications for many Indian peoples and should be set right.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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March 1979

CERTIFICATE OF SERVICE

I am one of the attorneys for the Petitioners and a member of the Bar of this Court. I hereby certify that I caused three (3) copies of the foregoing Petitioners' Reply to Brief in Opposition to Petition for Writ of Certiorari to be mailed, first Class postage prepaid, on March 1, 1979, to:

Robert K. Corbin
The Attorney General
Ian A. Macpherson
Assistant Attorney General
338 State Capitol
Phoenix, Arizona 85007
Attorneys for Respondents

All parties required to be served have been served.

Neil Vincent Wake
Neil Vincent Wake

Supreme Court of the United States

October Term, 1979

No. 78-1177

WHITE MOUNTAIN APACHE TRIBE, et al.,

Petitioners,

v.

ROBERT M. BRACKER, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIV. ONE

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINION BELOW

The opinion of the Arizona Court of Appeals, Division One (Pet. App. 24a-23a), is reported at 120 Ariz. 282, 585 P.2d 891. The judgments of the Arizona Superior Court (Pet. App. 19a-23a) are unreported, as is the order of the Arizona Supreme Court (Pet. App. 37a) denying review.

JURISDICTION

The opinion and order of the Arizona Court of Appeals were filed June 29, 1978. (Pet. App. 24a-35a.) A timely motion for rehearing was denied by that court on August 28, 1978. (Pet. App. 36a.) A timely petition for review by the Arizona Supreme Court was denied by order filed on October 4, 1978. (Pet. App. 37a.) The Petition for Writ of Certiorari was filed in this Court on December 29, 1978. The petition was granted on October 1, 1979. Jurisdiction is conferred on this Court by 28 U.S.C. § 1257 (3) (1970).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The constitutional provisions, statutes, and regulations involved, which are set out verbatim in the addendum to this brief, are as follows:

U.S. Constitution Art. 1 § 8
U.S. Constitution Art. 4 § 3
25 U.S.C. §§ 196, 406, 407, 466 and 476 (1976)
25 C.F.R. §§ 141 and 142 (1979)
Amended Constitution and Bylaws of the White Mountain Apache Tribe of the Fort Apache Indian Reservation, Arizona.
Ariz. Rev. Stat. Ann. §§ 28-1551, 28-1552, 28-1556 (1979 Supp.), 40-601 (1974) and 40-641 (1979 Supp.).

QUESTIONS PRESENTED FOR REVIEW

(1) Whether comprehensive federal regulation of Indian timber preempts the State of Arizona from taxing a tribe's own use of tribal and BIA roads, through its non-Indian agents, on its reservation in the operation of its timber enterprise, where the State has no regulatory authority over and gives no financial support to those roads.

(2) Whether the tribal right of self-government is infringed upon by state taxation of the use by the tribe's non-Indian agents of tribal and BIA roads on the tribe's business on the reservation, where the state has no regulatory authority over and gives no financial support to the tribal roads the use of which is said to occasion the "compensatory" taxes.

STATEMENT OF THE CASE

A. *Procedural History.*

This is an action for refund of state taxes paid under protest brought originally by Petitioner Pinetop Logging Company[1] in the Arizona Superior Court, Maricopa County, on December 8, 1971. The taxes for which refunds are sought are the Arizona 2.5% gross receipts tax on motor carriers levied by Ariz. Rev. Stat. Ann. § 40-641 (1979 Supp.), denominated a "motor carrier license tax", and the Arizona 8¢ per gallon "use fuel tax" levied by Ariz. Rev. Stat. Ann. § 28-1552 (1979 Supp.) upon the consumption of motor fuel on highways within the state. The Respondents, defendants below, are the Arizona state officials charged with collection and enforcement of the challenged taxes.[2] Similar refund actions have also been filed by other persons, and the parties have treated this suit as a test case.

The suit was broadened by the First Amended Complaint filed in February 1974 (Pet. App. 1a-18a), which joined the White Mountain Apache Tribe as an additional plaintiff

[1] "Pinetop Logging Company" is the business name of two Oregon corporations, E. H. Loveness Lumber Sales Company and Basin Building Materials Company, which jointly conduct the logging business which is the subject of this litigation. (Pet. App. 2a-3a.)

[2] The Respondents are Robert M. Bracker, Chairman of the Arizona Department of Transportation Board; Armand Ortega, Vice Chairman of the Arizona Department of Transportation Board; Edward J. McCarthy, Ralph A. Watkins, Jr., John W. McLaughlin, John Houston, and William A. Erdman, members of the Board, Arizona Department of Transportation; and Philip Thorneycroft, Assistant Director, Arizona Department of Transportation, Motor Vehicle Division.

and sought also declaratory and injunctive relief against collection of the taxes.[3]

In March 1974 the parties filed cross-motions for partial summary judgment addressed to whether application of the state taxes to Pinetop Logging Company is prohibited by federal law. The evidentiary showing made by the Tribe and Pinetop on their motion for summary judgment was accepted as true by the State since the State elected to file no controverting affidavits. The Superior Court entered an order on May 28, 1975, rejecting all claims of federal protection against these state taxes. (Pet. App. 19a-20a.) The case then proceeded to trial on a purely state-law question over the manner of calculating the gross receipts taxes said to be due. After trial of that remaining issue, final judgment was entered September 7, 1976 denying the Tribe and Pinetop all relief. (Pet. App. 21a-23a.)

The Arizona Court of Appeals, Division One, affirmed the trial court's rejection of the Tribe and Pinetop's federal law claims against these state taxes. The state intermediate appellate court did uphold Pinetop's state-law claim under stipulated facts to a partial refund of the motor carrier license taxes, though the State's claim for motor fuel taxes was upheld in its entirety. (Pet. App. 24a-33a.) The Arizona

[3] The First Amended Complaint also joined as additional defendants the Arizona Corporation Commission and its members and the Governor and the Attorney General. It further sought relief against the new defendants prohibiting them from attempting to regulate the relationship between the Tribe and Pinetop as a "contract motor carrier of property" under the provisions of Ariz. Rev. Stat. Ann. §§ 40-601 *et seq.* (1974 & 1979 Supp.). These new defendants originally answered admitting that they claimed the authority to regulate Pinetop Logging Company's contract logging services for the Tribe on the reservation. (Answer to First Amended Complaint, ¶ XX, filed February 26, 1974.) However, after the filing of Appellants' Opening Brief in the Arizona Court of Appeals, those new defendants agreed that they would no longer attempt to regulate Pinetop Logging Company's logging services provided to the Tribe. Based on this settlement, these new defendants were dismissed from this litigation. (App. 4-5.) This case has since proceeded against the Arizona tax officials only.

Supreme Court declined to grant review of the decision. (Pet. App. 37a.) The case now comes to this Court on Writ of Certiorari.[4]

B. *Facts*

The facts of record in this case are undisputed. Although they are rich in detail, they can be summarized as follows:

1. The White Mountain Apache Tribe builds, owns, maintains, and regulates (together with the federal government) a system of roads, almost entirely unpaved,

[4] Parallel litigation is also pending in the U.S. District Court for the District of Arizona, No. CIV-73-788 PTC WEC. When the State first claimed taxes from Pinetop in late 1971, it was informally agreed that future disputed taxes would be paid under protest as they accrued, which has been done since November 1971. The State also threatened to collect some $30,000 said to be due for the periods between 1969 and November 1971. Since payment of this sum would have crippled Pinetop, the parties also informally agreed that collection of this $30,000 would be postponed until conclusion of the tax refund litigation.

In late 1973 the State determined to abandon this agreement and threatened to execute immediately on Pinetop's equipment to collect the $30,000. Since the Arizona courts have no power to enjoin collection of these taxes (Ariz. Rev. Stat. Ann. §§ 40-648 (A) and 28-1585 (A) (1979 Supp.)), the Tribe and Pinetop sued the same defendants in federal court on December 12, 1973 to enjoin collection of the taxes for the periods from 1969 to November 1971. A temporary restraining order was granted on December 13, 1973. At a hearing on January 14, 1974, the U.S. District Court determined to stay the federal action on the condition that the state officials consent to a continuation of the temporary restraining order at least until conclusion of the state court refund action. The state officials accepted the District Court's offer, the restraining order was continued (later modified to to a consent preliminary injunction on February 3, 1976), and no further action has been taken by the District Court.

The state court tax refund proceeding was wholly independent of the federal action, and the questions now before this Court on certiorari were fully litigated in the Arizona trial and appellate courts. The finality of the decision below for purposes of this Court's jurisdiction is therefore unaffected by the pendency of the federal action. *Cf. NAACP v. Button*, 371 U.S. 415, 427-29 (1963).

throughout its reservation. Many of these tribal roads are built and maintained as a part of the Tribe's proprietary timber harvesting enterprise. Agents of the Tribe use these roads when hauling tribal timber to the tribal sawmill.

2. The State of Arizona spends nothing to build, maintain, or police these tribally owned and BIA roads. Indeed, the State has no regulatory authority whatsoever over the use of these roads. The use of state roads is not involved in this suit.

3. The State of Arizona claims the right to tax the use of these tribal roads by the Tribe's agents when hauling tribal timber to the Tribe's sawmill. The State wishes to have these revenues to pay for building and maintaining wholly unrelated state highways located almost entirely off the reservation.

4. The road use the State seeks to tax is done as a part of the Tribe's own enterprise for the comprehensive management, harvesting, and marketing of Indian timber.

5. All the activities of the Tribe and of its non-Indian logger in this case are conducted on the reservation.

6. The activities of the tribal timber enterprise and of its non-Indian loggers are required by federal statutes and regulations to be, and are in fact, supervised and regulated in intimate detail by the federal government. The objects of that regulation are to achieve maximum sustained-yield harvesting, to promote Indian employment, to secure the entire financial benefit of the forest to the Indians, and to best compromise the economic and other values of the forest for the sole benefit of the Indians.

7. The economic burden of these taxes will pass entirely to the Tribe itself.

8. The economic effect of these taxes upon the Tribe, though not precisely determinable on this record, would be great. The Tribe has five other non-Indian loggers in addition to Pinetop Logging Company. The exactions from these two taxes would be many tens of thousands of dollars annually.

9. Federal protection from these taxes cannot result in any tax-motivated relocation of non-Indian activities onto the reservation. No unfairness to the state's off-reservation revenue raising interests or other abusive "marketing" of state tax immunities to non-Indians can occur here because reservation timber and tribal roads by definition are found only on the reservation and because the hauling of timber can only occur from where it is cut to the tribal mill, also on the reservation.

The full facts of record are as follows.

1. The Tribe and its Timber Enterprise.

The White Mountain Apache Tribe is a tribe of American Indians now numbering about 6,500 members and situated upon the 1,664,872-acre Fort Apache Reservation in the White Mountains of northeastern Arizona.[5] Some 720,000 acres of the reservation are commercial forest, of which approximately 300,000 acres are being utilized by selective cutting on a sustained yield basis. Under the present management plan for the forest, an area can be re-cut every 20 years without destroying the forest or damaging the watershed, which supplies about 35% of the water to the densely populated central portion of Arizona. (App. 8.)

---

[5] The Fort Apache Reservation was originally created as the White Mountain Reservation by an executive order of President Grant on November 9, 1871. Modifications to the boundaries were made by subsequent executive orders on December 14, 1872, August 5, 1873, July 21, 1874, April 27, 1876, October 30, 1876, January 26, 1877, March 31, 1877, December 22, 1902, and February 17, 1912. The boundaries were also modified by the Act of February 20, 1893, 27 Stat. 467. The Act of June 7, 1897, 30 Stat. 64, separated the reservation into the San Carlos Reservation south of the Salt River and the renamed Fort Apache Reservation north of the Salt River.

The Tribe is organized under a constitution approved by the Secretary of the Interior under the Indian Reorganization Act, 25 U.S.C. § 476 (1976). The Tribe supports its governmental and social programs almost entirely from its tribally-operated economic activities, of which its timber operations are by far the most important. For example, in 1971 the net profit from all tribal enterprises was $1,667,091, of which $1,508,713 was derived from timber operations. (App. 15.) All profits disbursed from the timber enterprise are used in tribal governmental, health, education and welfare programs. (App. 8.)

The Tribe's business name under which it manages, harvests, mills and sells tribal timber is Fort Apache Timber Company (FATCO).[6] FATCO is an economic enterprise of the tribe begun with funds borrowed from the United States government. It conducts all of its activities exclusively within the boundaries of the Fort Apache Indian Reservation. (App. 7, 16.)

Timber located on Indian reservation trust land is owned by the United States for the benefit of the tribe and cannot be harvested for sale even by the tribe without consent of the Congress. (*Infra*, 27-32.) The United States has entered into various contracts with FATCO allowing it to harvest reservation timber under the supervision of the Bureau of Indian Affairs, as will be explained in more detail later. Under these contracts, the Tribe directly receives royalties for the harvesting of its timber, and in addition FATCO may derive profits from the efficient processing and marketing of forest products. (App. 9.) FATCO is also a major on-reservation employer of Indians, employing approximately 300 tribal members. (App. 8.)

[6] For general discussion of FATCO see *White Mountain Apache Indian Tribe v. Shelley*, 107 Ariz. 4, 480 P.2d 654 (1971), and *Graves v. White Mountain Apache Tribe*, 117 Ariz. 32, 570 P.2d 803 (App. 1977).

FATCO is responsible for the entire timber operation including selection and cutting of trees, hauling to FATCO's mill, manufacturing the logs into timber, and marketing the finished lumber and pulpwood chips. Some discrete aspects of this integrated operation have been contracted out to six loggers such as Pinetop Logging Company.[7] Specifically, after the trees to be cut are marked by Bureau of Indian Affairs employees, the Tribe's contractors fell the trees, de-limb them, cut them to proper size, and transport them to FATCO's sawmill. At that point FATCO's own employees again take over the process and segregate the logs and manufacture them into lumber and pulpwood. In addition, the marketing of the finished products is done by FATCO. (App. 9.) There are six different contractors who perform these logging services for FATCO. (App. 11-12.) The contractors are compensated by FATCO according to an agreed-upon scale for every 1,000 board-feet of timber delivered to the sawmill. (Pet. App. 5a.)[8] FATCO originally experimented with performing its own felling and hauling but found itself unable to do so economically. It has therefore availed itself of the expertise of loggers such as Pinetop Logging Company and has also thus

[7] The Tribe's use of contractors for logging is in accord with the general practice of private timber companies in Arizona. (Carpenter Depo. 100.) The loggers are "independent" only in the sense that they, rather than FATCO, own the trucks and equipment they use. They do not have any discretion or freedom with respect to how to carry out their day-to-day services for FATCO. Their actions are subject to complete control and direction by FATCO and the BIA, as is explained in detail in this brief.

[8] Where reference is made to the First Amended Complaint, appearing at Pet. App. 1a-18a, in support of factual statements in this brief, the allegation in question has been admitted in the Answer to First Amended Complaint filed February 26, 1974.

freed itself from the capital requirements of performing all the necessary felling and hauling itself. (App. 12.)

Pinetop Logging Company does not conduct any business activities in Arizona off the Fort Apache Reservation. (Pet. App. 6a.)

The loggers such as Pinetop are also an important source of on-reservation employment for tribal members, who have an employment preference under the logging contracts with FATCO. Pinetop employs at least 50 tribal members, and the six together employ from 50 to 100 Indians. (App. 8.)

Although FATCO is owned and managed by the tribal government and all profits belong to the Tribe, no profits can be distributed until all obligations to the United States government have been satisfied and disbursement is approved by the BIA. (App. 9.)

2. Federal Regulation and Supervision.

The federal government is charged by statute and regulation with pervasive responsibility over Indian reservation timber. In addition to its many specific duties, the BIA is generally responsible for preparation and implementation of "management plans for the forest resources ... with a definite plan of silvicultural management and a program of action, including a cutting schedule, for a specific period in the future." 25 C.F.R. § 141.4 (1979). Under 25 C.F.R. Parts 141 and 142, the Bureau of Indian Affairs has entered into contracts with FATCO allowing FATCO to harvest and sell reservation timber. These contracts impose detailed responsibilities on FATCO, many of which have been passed on in turn by subcontract to FATCO's loggers such as Pinetop. (App. 10.)

Indeed, the form contracts between FATCO and its loggers are prepared by the BIA and contain terms dictated and enforced by the BIA, even though the BIA is not a signatory to the contracts. (Carpenter Depo. 98.) All Pinetop's contracts with FATCO must be approved by the BIA. (App. 14.)

This pervasive federal supervision under regulations, contracts, and unwritten practices of the BIA extends to all aspects of the timber activities of FATCO and its contractors. For example, BIA foresters supervise the marking, cutting, and hauling of timber by FATCO and its contractors. (App. 12.) It determines which and how much timber will be cut (App. 12; Carpenter Depo. 56), and where and when roads will be built for the harvest of timber. (App. 10-11.) They pick out particular trees to be felled and determine which roads may be used and when. (Carpenter Depo. 54.)

The federal officials determine whether weather conditions will permit work, the direction in which felling should move, whether too much skidding is being done, where skid roads will be made, whether too much wood is left in an area, and how brush is to be piled. (Carpenter Depo. 56-57.)

BIA employees together with FATCO employees grade the timber for manufacture into lumber or into pulpwood chips. (*Id.* at 60.) In addition, they regulate many facets of the hauling of logs, such as speed, permissible road conditions, safety, and the width, length, height, weight and binding of loads. (*Id.* at 94.) The Bureau even dictates what types of tractors may be used by non-Indian loggers doing business with FATCO on the reservation. (*Id.* at 112.) BIA employees effect this supervision of Pinetop by daily instructions given in the field. This extensive supervision is summarized by the BIA head forester in charge of the Fort Apache Indian Reservation as "encompassing all aspects of

forest utilization and management, including extensive rules and regulations governing in detail the planning, engineering, construction, maintenance and general regulation of all roads used by loggers." (App. 14.)

3. Tribal Roads.

Tribal roadways are at the core of FATCO's timber operations. Passable roadways are essential to an environmentally and economically successful timber management program. Furthermore, the construction and maintenance of passable roads throughout the mountainous reservation is one of the most important products of the timber program to the Indians.

There are three types of roadways on the Fort Apache Indian Reservation. One is federally funded Bureau of Indian Affairs roads. Another is state highways. A third is tribal roads financed and maintained by the Tribe, which includes roads constructed and maintained by FATCO and its contract loggers. (Pet. App. 6a.)

The State of Arizona contributes nothing to the construction or maintenance of tribal and BIA roads. Indeed, even though the state is supposed to maintain its own highways running through the reservation, some of the maintenance of state roads is done by the BIA and by the Tribe in order to keep them at acceptable levels of repair. (App. 13.)

In order to reach the timber stands, FATCO and its loggers expend substantial funds to construct and maintain tribal roads as required by the BIA superintendent. A high percentage of Pinetop's receipts in particular is spent to construct new roads and to maintain existing roads. Pinetop has separate personnel and equipment dedicated solely to road maintenance. (App. 11.)

Thus, the reservation's rural transportation system is financed in reality in large part out of the timber program. Because of this relationship between tribal roads and timber harvesting, the adequacy of the Tribe's road system for its members and its visitors is tied directly to the extent and to the financial successfulness of tribal timber activi-

ties. Accordingly, the Bureau of Indian Affairs also oversees every aspect of roadway planning, construction, and maintenance as an aspect of the tribal timber operation. The BIA superintendent polices the activities of FATCO and its contract loggers and dictates when repairs must be made on what roads. The contracts which give the loggers permission to use existing roads expressly subject that use to applicable BIA regulations and such other conditions as the superintendent may impose. FATCO and its contractors have all been required to agree to repair existing improvements on the reservation according to their proportionate use of the roads. The BIA superintendent has the authority to order maintenance or repair of any roads used by the contractors. The only recourse from the superintendent's orders is to the Area Director of the BIA. (App. 10, 13.)

In a few places FATCO's contractors are required to use or cross state highways. Accurate records are kept of the mileage on state highways, and use fuel and motor carrier license taxes allocable to those uses have been paid without protest and are not involved in this lawsuit. (Pet. App. 9a; App. 11.)

4. The Arizona Motor Carrier License Tax and Use Fuel Tax.

Under Ariz. Rev. State. Ann. § 40-641 (1979 Supp.) contract motor carriers of property as defined in Ariz. Rev. Stat. Ann. § 40-601 (1974) are taxed at 2.5% of their gross receipts to support "the maintenance of Arizona highways from parties who enter into business arrangements which look directly to the inordinate use of public highways to realize pecuniary benefits."[9]

This gross receipts tax, denominated a "motor carrier license tax," is "a privilege tax . . . on the right to do business in a certain manner." *Shaw v. State*, 8 Ariz. App. 447, 451, 447 P.2d 262, 266 (1968). The tax is required of persons

[9] *Campbell v. Commonwealth Plan, Inc.*, 101 Ariz. 554, 557, 422 P.2d 118, 121 (1966); *Purolator Security, Inc. v. Thorneycroft*, 116 Ariz. 394, 396-97, 569 P.2d 824, 826-27 (1977).

who carry property for compensation by motor vehicle on "any public street, alley, road, highway or thoroughfare of any kind used by the public or open to the use of the public as a matter of right for the purpose of vehicular traffic." Ariz. Rev. Stat. Ann. § 40-601(A) (11) (1974).

Under Ariz. Rev. Stat. Ann. § 28-1552 (1979 Supp.) a tax of 8¢ per gallon is levied upon the use of fuel to propel a motor vehicle on "any highway within the state," which includes "any way or place in the state of whatever nature open to the use of the public." Ariz. Rev. Stat. Ann. § 28-1551(4) (1979 Supp.). The statute itself states that the tax is levied "for the purpose of partially compensating the state for the use of its highways." Ariz. Rev. Stat. Ann. § 28-1552 (1979 Supp.).

Thus, both taxes are taxes on road use. The use fuel tax is on the using of fuel on "any highway," and the motor carrier license tax is on using roads for certain commercial purposes.

Although the articulated objective of these taxes (compensating the state for the use of "its" roads) has no application to the use of tribal roads by agents of the tribe in connection with the tribe's own business, nevertheless, these statutes literally apply here because the tribal roads are in fact used by the public[10] and are "within this state." *Cf.* Ariz. Rev. Stat. Ann. §§ 28-1552, 25-1551(5), and 40-641(B) (1979 Supp.).

[10] The unfairness of the State of Arizona's claim to tax the Tribe's own use of its roads is further confirmed by the fact that the Tribe could prevent these state taxes on its agents by excluding all non-Indian hunters, fishermen, and recreationists. The roads would then no longer be "open to the use of the public" within the language of these statutes. It is only because the Tribe has not sought to exclude nonmembers from the use of these roads for the enjoyment of the reservation that these taxes are owing even under the overreaching language of the statutes themselves.

When Pinetop Logging Company first began logging for FATCO in 1969, it did not anticipate any liability for these taxes. In 1971, the Respondent State officials began assessing these taxes against Pinetop. (Pet. App. 6a-7a.) The State further claims the right to tax all travel by non-Indians that occurs over tribal and BIA roads on the reservation. (Pet. App. 8a-9a.)

5. Economic Impact of These State Taxes on the Tribe.

The financial burden to the Tribe from collection of these taxes from its loggers would be very great. Pinetop is one of six non-Indian contractors logging for FATCO on the reservation. (App. 8.) Other refund litigation in the state courts has been stayed to await the outcome of this test case. It is also agreed that the situation presented in this case occurs as well on other Indian reservations in Arizona. (Pet. App. 3a.)

Although the nominal taxpayer selected by the State of Arizona in this case is the non-Indian logger, since Pinetop Logging Company is doing business directly with the Tribe as a part of the Tribe's own comprehensive timber enterprise, any taxes which may be collected from Pinetop must be passed on to the Tribe as a part of Pinetop's cost of doing business with and for the benefit of FATCO. (App. 11, 15.) After these taxes were demanded by the State, FATCO was compelled to agree to pay them in the future on behalf of Pinetop rather than lose Pinetop's services (App. 11), though no such indemnity has been given for back taxes accrued before 1971.

The exact financial loss to the Tribe from the collection of these state taxes from its non-Indian loggers cannot be determined precisely from the present state of the record. Only one of six such loggers is a party in this case. The State has claimed assessments in the range of $30,000 for a two-year period between 1969 through November 1971 against Pinetop Logging Company alone. In addition, Pinetop paid $33,816.01 under protest between November 1971

and May 1976, and additional protest payments have continued since then. The amounts paid under protest are Pinetop's estimates and have not been audited by the State.

The Arizona Court of Appeals sought to belittle these taxes by suggesting that "only $9,000 annually in excise privilege taxes is going to be borne by the tribe." (Pet. App. 31a-1.) In fact, this $9,000 figure was taken by that court from a speculation in the State's brief which was not grounded in the evidence of record.

For the reasons stated above, the amount of taxes already paid under protest in this case probably reflects only a small portion of the true economic impact of these state taxes on the Tribe. Petitioners believe the extent of these taxes on all FATCO's operations, if allowed, would be many tens of thousands of dollars annually.

SUMMARY OF ARGUMENT

State motor fuel and gross receipts taxation of a tribal agent's use of tribally owned, built, and maintained roads and BIA roads on the reservation is preempted by comprehensive federal regulation of Indian timber. This preemption flows both from congressional occupation of the field of managing, harvesting, and marketing Indian timber and from specific congressional economic objectives to the utilization of Indian timber, which are frustrated by interposition of the state's unrelated revenue raising purposes for the support of off-reservation services.

Like the federal regulation of Indian traders held to be preemptive of state sales taxes in *Warren Trading Post Co. v. Arizona State Tax Commission,* 380 U.S. 685 (1965), federal regulation of Indian reservation timber dates back more than a century. Since as early as the 1890's, Congress has fully taken in hand all aspects of the management, harvesting, and marketing of reservation timber. Every aspect of Indian timber utilization from the highest level of planning down to the day-to-day activities of harvesting are supervised by federal officials.

The historic objectives of this intensive federal regulation have been primarily economic. Their general design is to secure to the Indians the entire economic benefit to be had from the timber. A specific economic objective fully articulated by Congress and the executive branch beginning in the Nineteenth Century is to use tribal timber as a base for on-reservation employment of Indians. Perhaps no economic policy of Congress is of greater importance to the preservation of Indian communities, culture, and welfare than the development of employment opportunities for Indians on the reservation so that they will not have to abandon their families and their traditional cultures in order to enjoy even a minimally decent standard of living.

Another important objective of comprehensive federal regulation of Indian timber is the statutorily required sustained-yield management of the forest. This philosophy of forest utilization entails many difficult judgments in the compromise of competing values of the forests for economic utilization, environmental preservation, recreation, and aesthetic enjoyment. Unitary management of the forest is essential if these competing values of the forest to the Indians are to be best promoted. Intrusion of state revenue raising objectives for the building of off-reservation roads will disturb and disarrange the complex and delicate task of multipurpose management of the forest for the sole benefit of the Indians.

The State, by contrast, can point to no specific justifications for taxing the use of tribal roads by the tribe's own agents in connection with its timber enterprise. The State offers no services or other compensating benefits and indeed intends to use these tax revenues entirely for the building and maintenance of unrelated state highways.

This federal regulation of Indian timber constitutes an occupation of the field which implicitly excludes state regulation, especially state taxation, of the same subject matter. Furthermore, these state taxes thwart the historic economic objectives of Indian timber utilization.

Even apart from the preemptive force of the comprehensive federal regulation of Indian timber, these state taxes must fall under the doctrine that "state law reaches within the exterior boundaries of an Indian reservation only if it would not infringe 'on the right of reservation Indians to make their own laws and be ruled by them.' *Williams v. Lee,* 358 U.S. 217, 219-220." *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation,* ___ U.S. ___ , 99 S. Ct. 740, 746 (1979).

Though the limit of the "infringement doctrine" protection against state taxation of non-Indian activities on the Indian reservation may be difficult to define in many cases, it is not at all difficult to see that that doctrine must protect against these state taxes in the circumstances of this case.

Since the infringement doctrine is the omnibus tool for judicial prevention of inappropriate state intrusion into reservation affairs which more properly should be left to the Indians, application of that doctrine may fairly allow inquiry into the substantiality of both the tribe's and the State's legitimate interests in having a given activity subject to or free from state regulation. Examination of all the legitimate indicia of tribal interests and of all the legitimate indicia of state interests in this case shows that the state interests in collecting these taxes fall far short of justifying the palpable intrusion they would cause into the internal affairs of the Indians.

The road use which the State seeks to tax is the Tribe's own use of its own roads through its non-Indian agents. The road use is an integral part of a comprehensive tribal timber management and harvesting system entirely directed and controlled by the Tribe and the federal

government. The specific incidence of these state taxes falls in part upon the use of roads. Yet those roads are Indian reservation trust land beneficially owned by the tribe and in which the state has no proprietary or regulatory interest.

The State itself has no palpable justification for taxing the use of these roads. The State has no regulatory or police power over the roads, and it spends no funds whatsoever to build, maintain, or police them. Indeed, the very justification articulated for these state taxes under the state statutes and case law is to "compensate" for the use of the *state's* roads—a justification which shows the unfairness of collecting these taxes in this case.

Furthermore, there is no possibility that the tax immunity claimed in this case could be abused by "marketing" immunities from state taxes to non-Indians. The activity in question—hauling tribal timber on tribal roads to the tribal sawmill—is incapable of being relocated from off the reservation to on the reservation in response to perceived tax advantages. Thus, there is no possibility that other activity which in the ordinary course would take place off the reservation and which the state fairly has justification for taxing might be induced to relocate onto the reservation. So, for example, unlike the sale of price elastic goods such as cigarettes, federal immunity from state taxation of a tribe's own use through its non-Indian agents of its own roads cannot be manipulated to the unfair disadvantage of the state's off-reservation revenue raising interests.

In summary, all the criteria under the infringement doctrine for excluding state jurisdiction suggest that the state taxes in this case are unjustified. There is nothing on the state's side of the scale.

ARGUMENT

I. PREFACE: CLEAR CONGRESSIONAL OBJECTIVES ARE OBSTRUCTED BY STATE TAXATION OF THE USE OF TRIBAL ROADS BY THE TRIBE'S OWN LOGGERS.

This Court has granted certiorari to consider two questions in this case. The first question is whether comprehensive federal regulation of Indian timber preempts state gross receipts and motor fuel taxes on a tribe's use of its own roads, through its non-Indian agents, where the roads are used and the gross receipts are earned in the cutting and hauling of tribal timber as a part of the tribe's timber management industry. The second question is whether, as applied in this case, these state taxes are prohibited by the doctrine that states may not exercise jurisdiction over non-Indian activities on the reservation where to do so would infringe on tribal self-government. *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164, 179 (1973).

This case presents as clear an instance as possible of a state's attempt to swell its treasury by taxation of on-reservation activities for which the state has no regulatory rights or duties and in connection with which it spends no public money to provide services or other compensating benefits. Typically, the effect of taxation throughout the state is to provide services for taxes. But its effect when applied on the reservation in this case is not to force the user of state services to pay his fair share of their cost, but rather to deliver a windfall to the users of state services by making *tribal* programs pay a share of the cost of state programs. Thus, the Tribe pays twice, once to finance the tribal services and facilities themselves and once again to the State for the "privilege" of using the Tribe's own facilities. We think well established doctrines of federal Indian law are fully adequate to prevent this exploitation of the Tribe.

The courts' task in adjudicating the boundary lines between state and tribal/federal authority is one of identifying the legitimate interests of the tribes and of the states. It bears emphasis that the selection of the objects of Indian policy and the corresponding expansions and contractions of state and tribal authority are legislative matters within the plenary control of Congress. *Washington v. Confederated Bands and Tribes of the Yakima Nation,* ___ U.S. ___, 99 S. Ct. 740, 761 (1979). Thus, we always look first to the treaties, statutes, and administrative regulations adopted thereunder to find if Congress has specifically allocated a given power between the tribes and the states. If explicit legislation speaks to the point, the inquiry is ended.[11]

However, a congressional intent to exclude state authority over a given matter can appear from the totality of congressional action in the field as well as from the letter of the statutes. Thus, congressional exclusion of state law can be inferred from congressional preemption of a field of specific legislative concern. *Warren Trading Post Co. v. Arizona State Tax Commission,* 380 U.S. 685 (1965).

A distinctive application of federal preemption flows from tribal sovereignty, the federally protected right of tribal self-government,[12] a right which is rarely stated in the express language of the treaties and executive orders but which is fundamental to the tradition of federal Indian policy. From that doctrine has evolved:

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[11] *E.g.,* 25 U.S.C. § 398c (1976) (authorizing state taxation of certain mineral production on the reservation); 25 U.S.C. § 231 (1976) (authorizing state health and sanitation jurisdiction on reservations); 25 U.S.C. § 1901 *et seq.* (1976) (the Indian Child Welfare Act, granting tribal courts jurisdiction and excluding state court jurisdiction of certain child custody disputes); 28 U.S.C. § 1360 (1978) (granting some state courts jurisdiction to hear civil disputes arising on the reservation between Indians).

[12] The preclusion of state jurisdiction flowing from the right of tribal self-government is viewed in modern jurisprudence as an aspect of federal preemption. *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164, 172 (1973).

general jurisdictional principles that apply in Indian country in the absence of federal legislation to the contrary. Under those principles, which received their first and fullest expression in *Worchester v. Georgia*, 6 Pet. (31 U.S.) 515, state law reaches within the exterior boundaries of an Indian reservation only if it would not infringe 'on the right of reservation Indians to make their own laws and be ruled by them.' *Williams v. Lee*, 358 U.S. 217, 219-220. *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, ___ U.S. ___, 99 S. Ct. 740, 746 (1979)

Preemption by comprehensive federal regulation and the infringement doctrine are related in their doctrinal origins under the Supremacy Clause and in the specific modes of analysis employed by each. Inquiry into implied federal preemption by comprehensive regulation is multifaceted. Analysis of the relative strengths of tribal and state interests under the infringement doctrine takes similar account of many considerations. The relevant considerations are often the same under both rubrics.

The primary consideration under both doctrines is the relevant congressional action. Where the Congress has identified specific objectives which are obstructed by the state law, the state law must yield on simple preemption principles.

When applying the infringement doctrine, we frequently have less direct guidance from Congress on what specific tribal interests come within the prerogative of "tribal self-government" deserving of protection from state interference. That doctrine does serve the vital function of tempering all inappropriate state impositions upon the practical ability of tribes to control their own affairs on their reservations, even when the specific subject matter has not received extensive legislative attention.

But even under infringement analysis, Congress may have spoken to the importance of the tribal interests which weigh in the balance against the state's claim to regulate, thus providing useful though indirect assistance in resolving the state's claim to jurisdiction.

In this case Congress has spoken with clarity and without compromise. The entire benefit of tribal timber utilization belongs to the Indians. The entire responsibility for managing tribal timber lies with the Indians and the federal government. The entire cost of tribal roads is borne by the Tribe and the BIA. Timber utilization is a major instrument of the congressional policy of alleviating Indian poverty. The State has no authority to regulate the use of tribal lands in general or tribal roads in particular. The State has nothing to weigh in favor of its desire to tax the use of tribal roads.

This is not one of those cases in which tribal and state interests fairly weigh against each other, thus requiring the courts to finely measure all the circumstances to find the balance. Congress has here placed a brick onto the tribal side of the scale. While some cases may be hard, this case is not.

We turn first to the claim of preemption by comprehensive federal regulation.

II. THE STATE ROAD USE TAXES ON GROSS RECEIPTS AND FUEL CONSUMPTION ARE PREEMPTED BY COMPREHENSIVE FEDERAL REGULATION OF INDIAN RESERVATION TIMBER.

The Arizona motor carrier license tax and use fuel tax on tribal loggers are implicitly preempted by comprehensive federal regulation of Indian timber, both because the field of Indian timber has been occupied by the federal government and because the State's revenue raising is an obstacle to the specific economic purposes of congressional regulation of Indian timber.

A. The Controlling Importance of *Warren Trading Post*.

Perhaps few fields of law are less amenable to accurate generalizations than the field of federal preemption of state laws. Claims of implied federal preemption can be examined only in the concrete, though some general principles, more helpful as beginning points of the inquiry than as solutions to any given problem, can be stated.

Three of the more important factors to be considered are given in *Commonwealth of Pennsylvania v. Nelson*, 350 U.S. 497 (1956): (1) whether "the scheme of federal regulation is so pervasive as to make reasonable the inference that congress left no room for the states to supplement it," (2) whether the federal statutes "touch a field in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject," and (3) whether state enforcement "presents a serious danger of conflict with the administration of the federal program." *Id.* at 502, 504, 505.

This model of preemption considerations—pervasiveness in fact of the federal regulation, dominance of the federal interests in the subject matter, and risk of conflict with federal administration—is drawn from a case not dealing with preemption of taxes. Therefore, this list of major concerns does not specify a particular type of interference with federal administration which will be of acute interest when the preemption claim touches state taxation. That is the effect of the state taxation on the specific economic objectives of the federal program.

Indeed, where this last factor of risk of interference with federal administration passes from risk to probability, it enjoys an independent preemptive significance even where the federal legislation does not amount to a complete "occupation of the field". It is sufficient to exclude state law that the state law "stands as an obstacle to the accomplish-

ment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Jones v. Rath Packing Co.*, 430 U.S. 519, 526, 540-41 (1977).

The preemptive significance of either full occupation of the field or obstruction of specific congressional economic objectives comes clearly into focus in *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685 (1965), a case so strikingly similar to this one that it overshadows all other precedents. *Warren Trading Post* held that federal regulation of reservation traders occupies the field of trading with Indians to the extent of implicitly preempting state taxation of the gross receipts of licensed traders.[13]

The statutes found preemptive in *Warren Trading Post* were 25 U.S.C. §§ 261 and 262 (1976), enacted in 1876 and 1901, which authorized the Commissioner of Indian Affairs to license and to "appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper, specifying the kind and quality of goods and the prices at which such goods shall be sold to the Indians." These statutes were implemented by detailed regulations appearing at 25 C.F.R. Parts 251 and 252 (1979).

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[13] The preempted tax in *Warren Trading Post* was the Arizona transaction privilege tax, which is not a sales tax but rather a tax on the privilege of engaging in the retail sales business in Arizona, measured at 2% of gross receipts. Ariz. Rev. Stat. Ann. §§ 42-1309 and 42-1312 (1979 Supp. Pamph.). The transaction privilege tax in *Warren Trading Post* is essentially identical to the motor carrier license tax since both are privilege taxes measured by a percentage of gross receipts, though they are separately enacted and separately codified in the Arizona Revised Statutes. Under each statute it is forbidden to engage in the taxed activity without a license from the State, and the gross receipts tax is levied on the license. A distinction between the two taxes is that while the transaction privilege tax is a tax on the privilege of doing certain businesses in the state in general, the motor carrier license tax is a tax on the privilege of doing business by burning fuel on roads and is used solely for state highway financing.

This Court noted initially that the statutes and regulations "would seem in themselves sufficient to show congress has taken the business of Indian trading on the reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." 380 U.S. at 690. This appearance was strengthened by the historic congressional policy of leaving Indians "largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities." *Id.* Thus, it was the Federal Government, not the State, which "provided for roads, education and other services needed by the Indians." *Id.*

This Court further concluded that the statutory objective of federal price regulation of goods sold to Indians would be upset in fact by the state taxes:

> We think the assessment and collection of this tax would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts. This state tax on gross income would put financial burdens on appellant or the Indians with whom it deals in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner. And since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax. *Id.* at 691.

In summary, the state tax in *Warren Trading Post* was preempted both because the United States had occupied the field and because the state tax "would to a substantial extent frustrate" the specific federal concern with the economics of the regulated activity, *i.e.*, a concern that prices be fair and reasonable to Indians.

The management, harvesting, and marketing of Indian timber is likewise the subject of long-established and pervasive federal regulation. It is similarly a field of dominant federal interest in which the State has no responsibility for services and delivers none. Most importantly, it is, to an even greater degree than Indian trading, a field in which Congress has identified specific economic objectives to its regulation, objectives which not only "could" be disturbed and disarranged by the State's competing revenue-raising ends but plainly are disrupted on the facts of record.

B. The History and Extent of Federal Regulation of Indian Timber.

An historical review of the law of Indian timber and of Congressional and executive regulation of it will show that all the criteria for preemption by federal occupation of the field are met, and further that such regulation has specific economic objectives which will be upset by these state taxes.

This Court first discussed the distinctive nature of property in Indian timber in *United States v. Cook*, 86 U.S. (19 Wall.) 591 (1874), which held that Indians have no right to cut timber for sale without consent of Congress. The Government brought a replevin against the buyers of saw logs cut and sold by the Indians, claiming the Indians had no power to pass good title to the logs to their buyers. In holding for the Government, the Court equated the Indians' property interest in the timber with the interest they held

in the land itself under the doctrine of Indian title,[14] saying:

> The right of the Indians in the land from which the logs were taken was that of occupancy alone. They had no power of alienation except to the United States. The fee was in the United States, subject only to this right of occupancy. This is the title by which other Indians hold their lands. . . .
>
> The timber, while standing, is a part of the realty, and it can only be sold as the land could be. The land cannot be sold by the Indians, and consequently the timber, until rightfully severed, cannot be. It can be rightfully severed for the purpose of improving the land, or the better adapting it to convenient occupation, but for no other purpose. . . . If the timber should be severed for the purposes of sale alone—in other words, if the cutting of the timber was the principal thing and not the incident—then the cutting would be wrongful, and the timber, when cut, becomes the absolute property of the United States. *Id.* at 592-94.

The primacy of the federal interest is so great that even innocent purchasers of timber wrongfully cut by Indians are liable to the Government for the full value of the logs at the time they receive them. *E. E. Bolles Wooden Ware Co. v. United States*, 106 U.S. 432 (1882).

After the decision in *United States v. Cook* it became common for Congress to enact special statutes authorizing the sale of Indian timber, providing always that the proceeds of such disposition should accrue to the benefit of the

[14] *See generally, Oneida Indian Nation of New York State v. County of Oneida, New York*, 414 U.S. 661 (1974).

tribe concerned.[15] Congress was aware even in those early times that timber harvesting presented a valuable opportunity for employment of Indians and for educating them into the economic life and the habits of self-sufficiency thought desirable by the whites.[16]

The first statute of general applicability to Indian timber was an amendment to a criminal statute to prohibit cutting trees on reservations or allotments. Act of June 4, 1888, 18 U.S.C. § 1853 (1976).

The first general authorization of sale of Indian timber was the Act of February 16, 1889, 25 Stat. 166, 25 U.S.C. § 196 (1976), which permitted the sale of dead and down timber under regulations to be adopted by the President.

[15] Examples of such statutes collected in U.S. Dept. of Interior, *Federal Indian Law* 657 n. 19 (1958) are the act of April 25, 1876, 19 Stat. 37 (Menomonee); act of July 5, 1876, 19 Stat. 74 (Kansas Indians); act of June 17, 1892, 27 Stat. 52 (Klamath River Indian Reservation); act of April 23, 1904, sec. 11, 33 Stat. 302, 304 (Flathead Indian Reservation); act of June 5, 1906, 34 Stat. 213 (Kiowa, Comanche, and Apache); act of March 28, 1908, 35 Stat. 51 (Menominee); act of May 29, 1908, 35 Stat. 458 (Spokane).

[16] For example, in the committee reports on the Act of March 28, 1908, 35 Stat. 51, dealing with timber on the Menominee reservation, it is stated in favor of the bill that "erection of sawmills and a lumber producing plant on the reservation will give [the Indians] work during the entire year," that with the benefit of federal supervision the timber supply will be made continuous, and that the Indians will have the income from the timber. H. Rep. No. 1086, 60th Cong. 1st Sess., 1-2 (1908). The Senate Report criticizes existing logging practices under which "the Indian received some financial benefit, but the system does nothing to educate him in the practical work of manufacturing the timber into lumber nor in the preservation and perpetuation of the forest." Instead, the proposed legislation places "the care of the forests and the harvest of the forests' crop ultimately in the hands of the Indians upon these reservations." S. Rep. No. 110, 60th Cong. 1st Sess., 2 (1908).

The regulations adopted in 1890 pursuant to that statute are described in *Pine River Logging Co. v. United States,* 186 U.S. 279 (1902), and reflect a primary concern with encouraging Indian employment and with reserving the exclusive financial benefit to the Indians.

The Court summarized the federal timber policy evidenced by the statute as follows:

> The object of the statute, as interpreted by these regulations, was evidently to permit deserving Indians, who had no other sufficient means of support, to cut for a single season a limited quantity of dead and down timber under the superintendency of a properly qualified white man, and to use the proceeds for their support in exact proportion to the scale of logs banked by each, provided that 10 percent of the gross proceeds should go to the stumpage or poor fund of the tribe from which the old, sick, and otherwise helpless might be supported. *Id.* at 285-6.

The Court also noted that the object of the statute was not just to secure the benefits of timber utilization to the Indians but also to spread those benefits among as many of the Indians as possible without monopolization of the work by a few. *Id.* at 286.

In *United States v. Paine Lumber Co.,* 206 U.S. 467 (1907), the court distinguished *Cook* and *Pine River Logging Co.* and held that an Indian allottee had the right to cut timber for sale without specific authorization from Congress.

This judicial qualification on the overriding interest of the United States in Indian timber was mitigated in *Starr v. Campbell,* 208 U.S. 527 (1908), which upheld presidential regulations adopted on December 6, 1893 governing certain sales of timber on allotments. In any event, Congress in 1910 firmly re-established its control over Indian timber on allotted lands as well as on unallotted lands in the Act of June 25, 1910, 36 Stat. 857, ch. 431 §§ 7 and 8. Section 8, 25 U.S.C. § 406 (1976), authorized the sale of timber on an allotment by the allottee with the consent of the Secretary

of the Interior, the proceeds to go to the benefit of the allottee under regulations to be prescribed by the Secretary. Section 7, 25 U.S.C. § 407 (1976), authorized the sale of living and dead and down timber on allotted lands under secretarial regulations, with the proceeds to be used "for the benefit of the Indians on the reservation." These sections were enacted at the request of the Secretary of the Interior to fill the need for a general authorization to harvest living timber. In a letter to the Speaker of the House of Representatives, the Secretary pointed to the financial and educational benefits to the Indians from reservation timber industries.[17]

Congress updated 25 U.S.C. §§ 406 and 407 in 1964. Act of April 30, 1964, 78 Stat. 186. Section 407 was amended to expressly state that timber on unallotted lands should be sold "in accordance with principles of sustained yield or in order to convert the land to a more desirable use . . ." The House Committee Report on this amendment evidences a federal concern with all aspects of Indian forest management:

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[17] The letter states in part:

> It is believed by this department that there should be a general law applicable to all Indian lands, because in many instances the timber is the only valuable part of the allotment or is the only source from which funds can be obtained for the support of the Indian or the improvement of his allotment.
>
> It is also important that there be authority to cut the mature timber from unallotted Indian lands, because much of it goes to waste under existing conditions. If the timber could be cut, it would furnish employment to Indians who now are unable to find work; it would furnish funds for tribal uses which could take the place of funds that must now be appropriated from the Treasury for their support. The department is doing everything it can to induce the Indians who have been living in accordance with their primitive habits to take up gainful pursuits. In many cases this problem could be solved by furnishing employment in cutting the timber, which is the most available industry to which their lands could be turned. H. Rep. No. 1135, 61st Cong. 2d Sess. 3 (1910).

> In enacting S. 1565 the Committee wishes it to be clearly understood modern means of reforestation practices as well as harvesting operations will be pursued in the implementation of the legislation. H. Rep. No. 1292, 88th Cong. 2nd Sess. (1964); 1964 U.S. Code and Adm. News 2162.

Although there had been some earlier administrative opinions suggesting that the tribes did not enjoy even the beneficial interest in timber under the general principles announced in *Cook* and *Pine River Logging Co,*[18] those misapprehensions were laid to rest by these express congressional declarations that the proceeds of Indian timber were to go to the benefit of the Indians. It was subsequently held that the tribes do enjoy the beneficial ownership of reservation timber and thus that the Court of Claims could properly award compensation for the timber value of Indian lands improperly taken by the United States. *United States v. Shoshone Tribe of Indians,* 304 U.S. 111 (1938), and *United States v. Klamath and Moadac Tribes of Indians,* 304 U.S. 119 (1938). As this Court stated in *United States v. Algoma Lumber Co.,* 305 U.S. 415 (1939):

> Under the provisions of the treaty and established principles applicable to land reservations created for the benefit of the Indian tribes, the Indians are beneficial owners of the land and the timber standing upon it and of the proceeds of their sale, subject to the plenary power of control by the United States, to be exercised for the benefit and protection of the Indians. *Id.* at 420-21.

The tribe's beneficial ownership of the timber, notwithstanding the Government's fee interest and plenary regulatory rights, is also confirmed in the holding of *United States v. Algoma Lumber Co.,* 305 U.S. 415 (1939), that the

[18] 19 Op. A.G. 194 (1888) and 19 Op. A.G. 710 (1890).

tribe is the seller of timber under a contract and that therefore no action will lie against the Government for breach of the contract, even though the Secretary is a signatory to the contract.

The Secretary's mandate to adopt implementing regulations under the 1910 Act has resulted in extensive administrative regulations under that statute dating from June 9, 1911. Those regulations and their successors have continued from the commencement of that statute until the present. *Cf. United States v. Eastman,* 118 F.2d 421 (9th Cir. 1941).

The intimation in *United States v. Paine Lumber Co.,* 206 U.S. 467 (1907), that the more individualized property interests of allottees might exclude their uses of allotment timber from the scope of federal regulation has proven unfounded. Extensive supervision of allotment timber cutting under 25 U.S.C. §§ 196 and 406 has been fully sustained as necessary to fulfillment of the federal trust responsibility to the allottees and to sound management of the forest as a whole. *United States v. Eastman,* 118 F.2d 421 (9th Cir. 1941); *cf., Quinault Allottee Association v. United States,* 485 F.2d 1391 (Ct. Cl. 1973).

The current regulations, appearing at 25 C.F.R. Parts 141 and 142, define the general objectives of the management of allotted and unallotted Indian forest land (§ 141.3), affirm the statutory requirement of sustained-yield management and require the BIA to adopt management plans for the forest (§ 141.4), closely restrict clear cutting (§ 141.5), encourage and provide special provisions for tribal logging and sawmill enterprises (§ 141.6), allow sale to non-Indians where the volume of timber available for cutting exceeds what can be developed by the Indians (§ 141.7(a)), allow the Secretary to sell timber on allotments without the consent of the allottees in certain emergency situations (§§ 141.7(b) and (c)), establish detailed procedures for the ad-

vertisement and sale of timber (§ 141.8),[19] authorize sales of cutting rights to Indians in some circumstances without adherence to the advertisement and auction procedures (§ 141.9), require deposits together with bids and prescribe manner of payment of the deposits and forfeiture of deposits if the high bidder does not perform the contract (§ 141.10), state circumstances in which a high bid can be rejected (§ 141.11), provide that contracts for sale of cutting rights shall be upon contract with the tribe approved by the Secretary (§ 141.12), define who must sign contracts (§ 141.13), require performance bonds (§ 141.14), describe the manner of payment (§§ 141.15 and 141.16), define the maximum time period for which a contract can be granted (§ 141.17), implement the statutory requirement of deductions from proceeds for federal administrative expenses of managing and protecting the forest (§ 141.18), establish alternate procedures for non-bid cutting permits (§ 141.19), define the terms on which Indians may cut for their own use without permits (§ 141.20), authorize the Secretary to fight forest fires (§ 141.21), establish procedures for protection of timber unlawfully cut and for recovery of penalties (§ 141.22), and establish administrative appeal procedures (§ 141.23).

Part 142 supplements Part 141 with specific provisions governing sale of forest products. Those regulations require advertisements in lumber trade journals and elsewhere (§§ 142.5 and 142.6), authorize sales to governmental entities (§ 142.8), define the payment terms (§§ 142.9 and 142.10), authorize commission sales through agents (§ 142.11), and require deposits on future deliveries (§ 142.12).

[19] Indeed, this section again confirms the overriding policy of securing the economic advantage of timber utilization to tribal members since it provides that auctions may be limited to members of the tribe and that members may be granted the privilege of meeting a higher bid submitted by a non-Indian.

The Secretary of the Interior is further directed by the Indian Reorganization Act "to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management. . . ." 25 U.S.C. § 466 (1976).

From this brief survey several conclusions emerge. First, the entire beneficial interest in reservation timber belongs to the tribe or to the allottees, as has been repeatedly confirmed by Congress in both general statutes and special legislation. Second, the federal regulatory power is plenary and has been exercised for more than a century over even the most minute details of the management, harvesting, and sale of Indian timber. Third, the Congress and the executive have explicitly indicated since as early as 1889 that Indian timber is to be managed both to provide on-reservation employment to Indians and give them the opportunity to alleviate through their own efforts the poverty which afflicts so many of them. Fourth, forest utilization should be an opportunity to the Indians to learn to direct their own collective affairs free of interference from others. Fifth, utilization of the forest must be done on a sustained-yield basis, with due regard to the other values of the forest to the Indians. Finally, it has been recognized as early as the 1890's that achievement of these goals will sometimes require the assistance of non-Indians, which assistance has been closely monitored by federal administrators to assure that such non-Indian involvement is consistent with the substantive federal objectives of Indian timber programs.

These historic federal objectives are conveniently restated at 25 C.F.R. § 141.3 (1979), a regulation which took its present form in 1964.[20] Those objectives are (1) "the preservation of such lands in a perpetually productive state . . . by applying sound silvicultural and economic principles to the harvesting of the timber," (2) "the regulation of the cut . . . so as to make possible continuous production and a perpetual forest business," (3) the development of

[20] 29 Fed. Reg. 14740 (1964).

Indian forests by the Indian people "for the purpose of promoting self-sustaining communities, to the end that the Indians may receive from their own property not only the stumpage value, but also the benefit of whatever profit it is capable of yielding and whatever labor the Indians are qualified to perform," (4) the sale of excess timber in open competitive markets "where the volume that should be harvested annually is in excess of that which is being developed by the Indians," (5) "the preservation of the forest in its natural state whenever it is considered, and the authorized Indian representatives agree, that the recreational or aesthetic value of the forest to the Indians exceeds its value for the production of forest products," (6) sound watershed management and minimization of erosion, (7) "the preservation and development of grazing, wildlife, and other values of the forest to the extent that such action is in the best interest of the Indians."

The same objectives are stated for the management of allotted forest lands except that additional emphasis is given to the financial needs of the allottees and their heirs. 25 C.F.R. § 141.3(b) (1979).

C. Federal Regulation of Indian Reservation Timber Harvesting Occupies the Field to the Exclusion of State Taxation of the Same Subject Matter.

1. Federal regulation is pervasive in fact.

The pervasiveness in fact of federal regulation of Indian timber is apparent from the foregoing summary of the history of federal supervision of Indian timber. In addition, the facts of record in this case show federal supervision of even the most minute and routine details of the timber activities of Fort Apache Timber Company and of its loggers. Pinetop Logging Company's every action is directed by the BIA or by FATCO on a daily basis. The scope and detail of

this actual federal regulation is plainly sufficient to make it reasonable to infer "that Congress left no room for the states to supplement it." *Commonwealth of Pennsylvania v. Nelson,* 350 U.S. 497, 502 (1956).

2. The federal interest in the subject matter is dominant, and the state interest is nil.

Under the rubric of dominance of the federal interest in the subject matter two inquiries are subsumed: the nature and extent of the federal interests and the nature and extent of the state interests.

(a) The Federal/Tribal Interests.

The dominance of the federal interests in the subject matter seems not to be disputed. The Arizona court conceded that "the federal government may have a dominant interest in the harvesting of tribal lumber." (Pet. App. 30a-4.) The State also appears to concede as much.[21]

Again, the dominance of the federal interest stems from at least the following factors:

1. The exclusive federal responsibility over the affairs of Indian tribes on their own reservations;

2. The exclusive federal and tribal responsibility for the regulation and use of reservation trust land, which includes tribal roadways;

3. The federal fee interest in the timber and the exclusive tribal beneficial interest in the timber;

4. The federal trust responsibility to assure best utilization of the timber for the sole benefit of the Indians;

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[21] *Cf.* Respondents' Brief in Opposition to Petition for Writ of Certiorari 10 (conceding that "there is a federal objective of fostering and promoting Indian forestry programs.").

5. The century-long congressional policy that Indian timber should be used to provide on-reservation employment of Indians in order to strengthen reservation economies, to alleviate Indian poverty, and thus to arrest the decay of Indian communities, culture, and family life;

6. The federal statutory responsibility for unitary management of the entire forest on a sustained-yield basis in order to best compromise all the values of the forest—economic, aesthetic, environmental, and recreational—for the sole benefit of the Indians;

7. The Tribe's federally authorized and approved rights under its constitution and bylaws to control its lands, resources, economic enterprises, and timber in particular.[22]

In summary, the forest is a complex and sometimes fragile ecosystem. The underdeveloped economies of many reservations are often only marginally able, or frankly unable, to provide Indian peoples with a minimally decent living. On the many reservations possessed of commercial timber resources the ecosystem and the economic system can be successfully managed and improved together or not at all. Both responsibilities are overwhelmingly that of the federal government in cooperation with its Indian beneficiaries.

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[22] The tribal constitution confirms the tribe's powers "to protect and preserve the . . . natural resources . . ." (Art. V § 1 (f), *infra* A-9); "to regulate the uses and disposition of tribal property" (Art. V § 1 (h), *infra* A-9); "to manage all economic affairs and enterprises of the tribe including tribal lands, *timber, sawmills,* flour mills, community stores, and any other activities" (Art. V § 1 (i) [emphasis supplied], *infra* A-9); "to provide by ordinance for the assignment, use or transfer of tribal lands within the reservation." (Art. V § 1 (m), *infra* A-10).

The restatement of these powers in the tribal constitution approved by the Secretary of the Interior under the Indian Reorganization Act, 25 U.S.C. § 476 (1976), confirms the tribe's federally-protected enjoyment of these powers. *See Quechan Tribe of Indians v. Rowe,* 531 F.2d 408, 410-11 (9th Cir. 1976); *Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655 (9th Cir. 1975).

(b) The State Interests.

To determine whether these federal/tribal interests, great as they appear, are "dominant," it must also be asked how substantial the state's bases are for coming upon the scene and laying claim to "its share" of the tribal forest resource. We are distinctly disadvantaged in attempting to discuss the state's specific and substantial interests in taxing the use of reservation roads by the tribal enterprise's agents. This is because in the entire history of this litigation the state has never put forward any specific interest which it thinks in fairness ought to weigh in favor of these taxes. Rather, in their briefs in the Arizona state courts and in their Brief in Opposition to Petition for Writ of Certiorari filed in this Court, the State has put forward only an abstract response to the preemption claim.

That response is that the admittedly dominant federal interests in the subject matter, weighty though they be, have not yet resulted in express and literal prohibitions of state commercial gross receipts taxes and fuel taxes on the use of tribal roads by agents of tribal timber enterprises.[23] The State then argues that in the absence of such an express prohibition the weighty federal interests cannot be weighty enough to overcome the State's secret and unarticulable interests in taxing these activities.[24] This response cannot be sufficient to rebut a substantial claim of preemption of state taxes. It is nothing less than a claim that no state tax can ever be excluded by federal law unless it is proscribed by name—which is patently not the law.

The State's sole reliance on its presumptive right to tax non-Indians constitutes a refusal to undertake the close inquiry into the substance of the regulations and into the specific governmental concerns of the United States and of

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[23] We think there are two such literal prohibitions found in the Arizona Enabling Act, 36 Stat. 557, 569 (1910) and 25 C.F.R. § 1.4 (1979); however, the grant of certiorari excluded consideration of the Enabling Act and the regulation.

[24] *Cf.* Respondents' Brief in Opposition to Petition for Writ of Certiorari 1-26, especially 15 & 16.

the State which is called for under preemption doctrine. Instead, the State tells us that though the Tribe has articulated federal interest after federal interest and though those interests weigh heavily indeed, they simply do not weigh enough to yet obligate the State to place its first gram-weigh on the scale of analysis.

Though the State has yet to reveal any specific and palpable justification for these taxes beyond its theoretical desire to tax anything it likes, perhaps the State will finally remove the bushel basket from over its candle when it files its answering brief in this Court. Until then, we can at least point out the following circumstances which we think show the State cannot seriously claim *any* specific interest in taxing these activities, much less any interest which could even approach the importance of the federal interest in the harvest of Indian timber.

The fundamental background fact is that the federal government has left the State of Arizona largely free of responsibilities or duties respecting Indian reservations. As the Court noted in *Warren Trading Post,* Arizona is specifically free from the duty to provide local roads for the use of the tribe. 380 U.S. at 690.

From that general fact, we come to the specific fact that the State of Arizona pays nothing to build, maintain or police the tribal roads it wishes to tax. But both the motor carrier license tax (which is a tax on using roads in certain commercial activities) and the use fuel tax (which is a tax on the consumption of fuel *on roads*) are used for road building and maintenance, and both are said to "compensate" the state for the use of "its" roads.[25]

Thus, though the justification for both taxes is to build and maintain state roads with funds derived from the use of those roads, application of those taxes in this case will result in the building and maintaining of off-reservation state roads from the use of tribally built and maintained

[25] Ariz. Rev. Stat. Ann. § 28-1552 (1979 Supp.); *Campbell v. Commonwealth Plan, Inc.*, 101 Ariz. 554, 557, 422 P.2d 118, 121 (1966).

reservation roads. As applied here, the State is not attempting to fairly allocate the cost of its public improvements to those who use them. Rather, the State instructs the Indians that they may not build their own dirt roads on their own reservations for the use of their own agents on their own business unless they are willing also to pay for paving the State's roads. The State's own justification for the fairness of its tax in general demonstrates its unfairness in this case. The State of Arizona wants something for nothing.

Nor is this a case in which the State might claim to tax the non-Indian's transaction with the Tribe because some of the aspects of the transaction take place off the reservation. Without presuming to state how much weight, if any, that argument should carry in general, in this case that argument carries no weight, since the entire activities of Pinetop Logging Company and of FATCO occur on the Fort Apache Reservation.

In some situations, the State may have an interest in taxing non-Indian activities on Indian reservations for purely defensive reasons. That is, unless the tax is allowed, any tax immunity might be manipulated—or perhaps abused—by inducing non-Indian activities which would otherwise take place off the reservation to relocate onto the reservation solely in response to the state tax immunity. For example, this can happen if price elastic sales to non-Indians are immunized from state taxes.[26] The tribe or the Indians could then profit from "marketing" tax immunities to non-Indians to the detriment of the State's legitimate off-reservation regulatory and revenue-raising objectives.

[26] By contrast, there is little risk of such expansive withdrawals of activities from state taxing authority when the non-Indian sells goods or services to the Indian for use on the reservation. This case and *Central Machinery Co. v. State of Arizona,* No. 78-1604, are instances of sales of goods (*Central Machinery Co.*) and services (this case) to tribes on the reservation.

Thus, we may assume that one indicium of state interest in taxing non-Indian activities on the reservation is whether the specific immunity is capable of an abusive expansion beyond its fair justification and that possible abuse is not preventable by principled judicial restrictions on the immunity. For example, in *Colville*[27] the Tribes claim that all state taxation of non-Indian purchases on the reservation should be excluded. The loss to the state treasury there is not limited by the needs of any specific federal program, nor by the purchasing needs of the Tribe itself, nor is it even limited to those sales of goods and services which occur for the use of Indians on the reservation. They do not claim an immunity for specific activities which occur on the reservation for the benefit of Indians and which have independent economic justification for occurring on the reservation. Instead, they claim that state taxes must yield precisely because the sole economic viability of the smoke shop business rests on the non-Indian buyers' hope for evading state taxes. Thus, in that case it is argued that the very fact that the immunity is capable of being sold to a non-Indian is a reason for recognizing the immunity. By contrast, we submit that a reason why the immunity claimed by the Tribe here should be upheld is precisely that this immunity is *not* saleable.

The tax immunity we claim will not cost the state one nickel in lost revenues from tax-motivated relocation of activities which would otherwise take place off the reservation. The tax immunity is incapable of expansion because, by definition, the immune activity—hauling tribal timber from where it is cut on the reservation to the tribal sawmill on the reservation—can only take place on the reservation. The immunity we claim is restricted to the scope of its justification by the very nature of trees and roads themselves.

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[27] *Washington v. Confederated Tribes of the Colville Indian Reservation*, No. 78-630.

In summary, though the risk of abusive marketing of a tax immunity may be one general consideration which *may* weigh in favor of the state's interests, in this case that risk is nil.[28] Hence, that state interest totals at zero in this case. The State of Arizona has nothing to weigh against the federal/tribal interests here. The federal/tribal interests are plainly dominant.

3. Interference with federal administration.

The most immediate and dramatic interferences with administration of the federal Indian timber program that flow from imposition of the state's unrelated revenue raising objectives on that program are the interferences with the economic objectives of that program. For convenience we shall separately discuss those effects in the following subsection of this brief since we submit that the interference with those specific objectives is clear enough to preclude the state taxes whether or not the timber regulation as a whole is deemed to occupy the field to the exclusion of all state jurisdiction. However, there are several obstructions to federal administration which are distinct from the obstructions of the federal economic objectives. We discuss them here.

Collection of these state taxes would in many ways undercut the long-established objective of involving the Tribe itself in the control of timber on the reservation (under the tutelage of the United States). This is discussed in more

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[28] Because the tax immunity we claim here is totally incapable of abusive expansion or "marketing," perhaps this is not the case for defining exactly when the potential for inappropriate and judicially uncontrollable expansion becomes so great that the state's interest in avoiding that abuse preponderates against the tax immunity. Therefore, we do not presume to state precisely where the line need be drawn. It suffices that this case falls on the tribal side of any line which may be drawn.

detail in the infringement section of this brief. If this state taxing jurisdiction is upheld, the Indians will learn, not the arts of controlling their own affairs, but rather the arts of state-law tax planning.

Another important obstruction of the federal administration is the interference with the sustained-yield management policies required by Congress. The statutes and regulations place upon the federal administrators the duty of managing the entire forest ecosystem and of best compromising all the competing values of the forest. As four members of this Court stated in *United States v. New Mexico*, 438 U.S. 645, 98 S. Ct. 3012 (1978) (dissenting opinion):

> [T]he modern view of the forest [is] as an interdependent, dynamic community of plants and animals:
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> > "The forest community, then, consists of an assemblage of plants and animals living in an environment of air, soil, and water. Each of these organisms is interrelated either directly or indirectly with virtually every other organism in the community. The health and welfare of the organisms are dependent upon the factors of the environment surrounding them; and the environment surrounding them itself is conditioned to a considerable degree by the biotic community itself. In other words, the plants, the animals, and the environment—including the air, the soil, and the water—constitute a complex ecological system in which each factor and each individual is conditioned by, and in itself conditions, the other factors comprising the complex.' S. Spurr, Forest Ecology 155 (1964). 98 S. Ct. at 3025 n. 4.

The interrelatedness and delicacy of the forest system which modern physical and biological sciences teach us have been fully appreciated by Congress.

Thus, when the state lays claim to a first call on many tens of thousands of dollars generated from the forest utilization program, it necessarily must affect the ability of the Tribe and of the federal administrators to effect reforestation, fire control, wildlife promotion, road improvement, safety inspection, and general policing of the forest out of those same revenue sources. Obviously, to the extent the state can claim some of the forest resource for paving its off-reservation roads, the Tribe and the federal administrators have that much less available to them to do the things which Congress has instructed them to do in the forest itself.

It can not be assumed that the federal management of Indian forests has been so successful that the resource can be diverted without consequence. Indeed, in its *Final Report* 324-28 (1977), the American Indian Policy Review Commission, a two-year Congressional study, concludes that the potential benefits from timber have not been achieved, in large part because of the BIA's lack of success at comprehensive management.[29]

Neither the State itself nor the state courts below deny that what the state gets the forest program must lose. The lower court, however, justified this exaction by saying that the amount taken was, *in the State's view*, not large enough "to bring a net million and a half dollar operation to its knees. . ." (Pet. App. 31a-1.) But we have already demonstrated (*supra*, 15-16), that the actual economic impact of this taxation upon the Tribe is many times greater than the state court was willing to acknowledge. But more importantly the very point of the preemption doctrine is that the self-interested state tax officials are not the persons to whom Congress has allocated the delicate judgments to be made in this regard. It is precisely because the judgments are delicate, difficult, and interrelated that they must be made by one authority with unitary responsibility. The Arizona tax officials in Phoenix are hardly in a good position

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[29] The *Final Report* also shows the importance of Indian timber resources throughout the country:

> One-fourth of all Indian lands are forested, and 10 percent of all Indian lands are commercial forest lands. Timber contributes from 25 to 100 percent of tribal revenues for 57 reservations; more than 80 percent on 11 of these reservations. . . . *Id.* at 324.

to judge when they have bled the White Mountain Apache Tribe's timber program of too much of its financial strength and thus have finally brought it "to its knees". It is no justification for allowing the wolves to guard the sheep to say that the wolves think the sheep are still doing well enough despite their losses.[30]

Unitary management of the forest by the federal officials in cooperation with the Tribe is necessarily hindered by the state's competing attempt to manage the forest for the sake of financing its off-reservation highways.

In summary, the Federal government has completely occupied the field of Indian timber harvesting to the exclusion of state taxation of the same activity.[31]

D. The State Taxes Obstruct the Specific Federal Economic Objectives of Indian Timber Regulation.

It seems true to the point of tautology that if the State of Arizona can drain tens of thousands of dollars in revenues out of the timber harvesting program, the Indians will to that extent not "receive... the benefit of whatever profit [the forest] is capable of yielding.. 25 C.F.R. § 141.3(a) (3)

[30] While we do not question the bona fides of the Arizona Court of Appeals, Indian people will surely be cynical at the suggestion that they are so prosperous on their dirt roads that they should be forced to help pave the State's roads. The Arizona court's remark about the financial ability of this Tribe to pay taxes to the State was made in total ignorance of the actual expenses of the Tribe's governmental and welfare programs, of the status of employment on the reservation, of the quality of Indian health, of the quality of reservation transportation, and of the adequacy of Indian education, to name only a few of the considerations relevant to whether the Tribe is "prosperous."

[31] There appears to be only one other reported decision on the preemptive effect of Indian timber regulation. *In re Humboldt Fir, Inc.*, 426 F.Supp. 292, 296 (N. D. Cal. 1977) holds that by virtue of congressional occupation of the field, and not because of any specific conflict with federal objectives, the federal common law of contracts rather than state contract law governs timber contracts between tribes and timber companies. That is a far more expansive preemption of state law than the tax preemption claimed in this case, and it is plainly in conflict with the analysis and holding of the Arizona Court of Appeals.

(1979). The specific economic objective of securing the entire benefit to the Indians is as clear as the objective of the Indian trader regulations to secure fair and reasonable prices for goods sold to Indians. The actual interference with this objective by state taxation is far clearer in this case than the interference with the fairness of the prices of goods sold to Indians that would flow from a 2% retail markup to cover a state sales tax. The express federal policy of securing the entire financial benefit of the forest to the Indians is plainly and literally defeated dollar-for-dollar by the collection of these state taxes.

Historic federal desires to promote on-reservation employment through timber utilization are also hampered by these state taxes. FATCO itself employs some 300 members, and the non-Indian loggers employ an additional 50 to 100 members under the Indian employment preferences in their contracts. (App. 8-9.) To the extent the marginal profitability of the enterprise is lower, the enterprise as a whole is compelled to eliminate marginal labor expenditures. Thus, fewer Indians are employable on the reservation and more of them are forced into the cruel dilemma of choosing between poverty and the abandonment of their reservation homes, families, and cultures. Nothing in the history of Indian timber regulation suggests that this most tragic failing of American Indian policy is to be tolerated to the slightest extent for the sake of paving roads in Phoenix and Tucson.

Finally, even if the State did provide actual services to the tribal harvesting program (which it does not), any attempt to justify taxes based on such services would run at specific cross-purposes to legislation under which the

United States (not the states) may charge for services provided to timber programs.[32]

Thus, federal economic purposes of every sort are violated by the collection of these taxes.

E. The Use of Tribal Roads and the Burning of Fuel to Haul Tribal Timber Stands at the Center of the Preemptive Force of the Federal Regulatory Plan.

Assuming as we do that federal Indian timber regulation has preemptive force against state taxation, then the final question is whether the particular state taxes in this case fall under the proscription of that preemption. In this case it is apparent that the taxed activities—burning fuel on tribal and BIA roads and earning gross receipts from hauling timber to the tribal mill on those roads—stand at the very core of the timber harvesting program. Whatever else the Indian timber industry may include, getting the trees to the mill is an essential part of it.

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[32] The relevant statutes are as follows:

The Secretary of the Interior is authorized to charge purchasers of timber on Indian lands that are held by the United States in trust, or that are subject to restrictions against alienation or encumbrance imposed by the United States, for special services requested by the purchasers in connection with scaling, timber marking, or other activities under the contract of purchase that are in addition to the services otherwise provided by the Secretary, and the proceeds derived therefrom shall be deposited to the credit of the appropriation from which the special services were or will be provided. 25 U.S.C. § 407d (1976).

The Secretary of the Interior is hereby authorized, in his discretion, and under such rules and regulations as he may prescribe, to collect reasonable fees to cover the cost of any and all work performed for Indian tribes or for individual Indians, to be paid by vendees, lessees, or assignees, or deducted from the proceeds of sale, leases, or other sources of revenue: *Provided*, That the amounts so collected shall be covered into the Treasury as miscellaneous receipts, except when the expenses of the work are paid from Indian tribal funds, in which event they shall be credited to such funds. 25 U.S.C. § 413 (1976).

Because these two state taxes touch activities central to the timber harvesting program, this Court need not judge in this case, any more than it did in *Warren Trading Post*, precisely how wide the preemptive reach is. It is sufficient that, if the scheme has any preemptive significance at all, that significance must be felt here.

III. THESE STATE TAXES ON THE TRIBE'S AGENTS IMPERMISSIBLY INFRINGE ON TRIBAL SELF-GOVERNMENT.

A. The Infringement Doctrine

Even in the absence of specific statutes or regulations in point, challenges to state jurisdiction on Indian reservations are measured against the fundamental principle that state law is allowed to reach into the Indian reservation only to the extent that it can do so without infringing "on the right of reservation Indians to make their own laws and be ruled

by them."[33] *Williams v. Lee*, 358 U.S. 218, 220 (1959). *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), makes clear that application of state law to Indians on the reservation is presumptively invalid absent specific congressional approval. The infringement rule is meant to test the permissible scope of state power over the non-Indian aspects of transactions on reservations involving both Indians and non-Indians:

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[33] The infringement doctrine takes its roots in the doctrine of tribal sovereignty—the recognition that the Indian tribes preexisted the Constitution as sovereign political entities and continue to exercise governmental powers under the protection of the United States. That doctrine was first articulated by Chief Justice Marshall in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). "It followed from this concept ... that state law could have no role to play within the reservation boundaries." *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 168 (1973). As is stated in *United States v. Wheeler*, 435 U.S. 313 (1978):

> The powers of Indian tribes are, in general, *'inherent powers of a limited sovereignty which has never been extinguished.'* F. Cohen, Handbook of Federal Indian Law 122 (1945) (emphasis in original)....
>
> Indian tribes are, of course, no longer 'possessed of the full attributes of sovereignty.' United States v. Kagama, supra, at 381. Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised....
>
> ... The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufference of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status. See Oliphant v. Suquamish Indian Tribe, ante, p. 191. 435 U.S. at 323-24.

In summary:

> The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read. *McClanahan, supra*, 411 U.S. at 172.

> In these situations, both the tribe and the state could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the state could protect its interest up to the point where tribal self-government would be affected. *Id.* at 179.

While there is no *general* immunity of non-Indian activity or property from state regulation or taxation, specific instances of taxation of non-Indians must pass muster under the infringement test.

In recent times, this Court has spoken only twice with respect to how the infringement test applies to state taxation of non-Indian activities on the reservation.

The first was a considered dictum in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 170 n. 6 (1973), stating that the Arizona gross receipts tax on the non-Indian retailer in *Warren Trading Post* was infirm under the infringement doctrine. The non-Indian loggers on the Fort Apache Reservation are identically situated to the non-Indian retailer in *Warren Trading Post*. In both cases, goods and services are sold to the Indians on the reservation. Both activities have independent economic justification for occurring on the reservation. In both instances, the economic burden of the state tax falling on the non-Indian unquestionably passes to the Indians (or the Tribe) for whose benefit the goods or services are sold. In both instances, the ouster of state taxing jurisdiction is limited and precisely coextensive with the federal objective of freeing Indians from actual burdens of state law, even where the legal incidence of the burden falls on a non-Indian.

This Court's second application of the infringement doctrine to non-Indians is *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), which found no infringement on tribal self-government from state taxation of

cigarette purchases by non-Indians. That claim of infringement was rejected because "it is the non-Indian consumer or user who saves the tax and reaps the benefit of the tax exemption." *Id.* at 481-82.

Indians or the tribes would have financially benefited in each instance. However, the infringement claim was accepted in the *McClanahan* dictum concerning *Warren Trading Post* while it was rejected in *Moe* because of a difference in the character of the financial benefit which would have accrued to the Indians in each case. Where the financial burden of the tax upon the non-Indian does in fact pass to the Indians or the tribe and the sale is of goods or services used by the Indians or the tribe on the reservation, immunity under the infringement doctrine is appropriate because it frees the Indians themselves of state law burdens on their own affairs. It infringes on tribal government for the state to in fact burden the Indians for their own personal needs on the reservation.

In contrast, recognition of an infringement claim in *Moe* would not have benefitted the Indians with respect to their own personal needs but, rather, would have delivered to them an entrepreneurial advantage to the benefit of the non-Indian buyer. But it is considerably removed from the purpose of leaving the Indians alone to allow them to sell to non-Indians as well the privilege of being left alone by the state.

Infringement doctrine immunity of sales to Indians on the reservation is tied to the historic federal purposes and limited to its justification.

B. Specific Interferences With the Governmental Freedom of the White Mountain Apache Tribe.

If additional and more specific interferences with the governmental freedom of the White Mountain Apache Tribe are sought, they are not difficult to find.

First, these taxes interfere with tribal judgments about who may use tribal roads, for what purposes, and on what conditions. These taxes seek to impose additional burdens on those the Tribe has authorized to enter and use reservation roads. In this case, these taxes would totally deter Pinetop from coming onto the reservation and hauling and using fuel thereon, had the Tribe not agreed to pay these taxes in the future for Pinetop if they are found legal.

The taxes infringe on tribal control of its timber resources by conditioning non-Indian hauling of timber on tribal and BIA roads upon payment of taxes to the state.

An even more direct infringement is that the tribal choice of the means of managing and harvesting timber is hampered. After experimentation, the Tribe consciously chose to contract out its logging because it was more economical and efficient to do so. If these taxes are upheld, the Tribe may have to do its own logging in order to avoid these substantial additional costs. (App. 11-12.)

One of the Tribe's specific reasons for contracting out logging was the great capital cost of doing its own logging. Forcing the Tribe to do its own logging to avoid these taxes will drastically interfere with the Tribe's judgments about the management of tribal economic affairs and business enterprises and its choices of how to invest tribal funds. Those rights are reserved in the Tribe itself under its federally approved constitution and by-laws. (Art. V, § 1 (i) and (k), *infra*, A-9.)

These taxes, because they must ultimately be borne by the Tribe as a business cost, bear directly upon the planning and scope of reservation economic development, which is likewise the prerogative of the Tribe under the supervision of the federal government. *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 664 (9th Cir. 1975).

As has been explained in detail, these taxes on hauling and fuel consumption on Indian roads in the logging of Indian timber will also interfere with a specific objective of the White Mountain Apache Tribe to promote road construction and maintenance as a by-product of the timber harvesting program.

C. The State of Arizona has no Substantial Interest in Taxing the Tribe's Loggers; Only the Fact that the Technical Incidence of the Tax Falls Upon Non-Indians Favors the State, but that Fact Alone Is Insufficient to Rebut a Substantial Showing of Infringement.

Since the infringement doctrine is the residual tool for preventing inappropriate extension of state jurisdiction onto Indian reservations, analysis under that doctrine ought to take account of the interests of the state in exercising a particular jurisdiction. This Court has acknowledged that "notions of Indian sovereignty have been adjusted to take account of the state's legitimate interests in regulating the affairs of non-Indians." *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164 (1973). Without pretending to exhaustiveness, the following circumstances at least would be worthy of examination in determining the nature and the legitimacy of the state's interests as well as the Tribe's:

1. Situs of the transaction, either entirely or largely on the reservation.

2. Proximity of the subject matter to traditional interests of Indians or of the Tribe.

3. Whether recognition of state authority over the non-Indian aspects of the Indian/non-Indian transaction will, as a practical matter, impair the Tribe's authority over the Indian aspects of the transaction.

4. In tax questions in particular, whether recognition or rejection of the claim of immunity from state law will result in unfair misallocations of the costs and benefits of public services.

5. Whether the exclusion of state jurisdiction can be abusively expanded so as to injure a state's economic or regulatory interests disproportionately to the protection of Indian interests that would flow from recognition of the immunity.

6. Proximity of the subject matter to a field of specific congressional concern.

Again, while this list of major inquiries to be made in any attempt to balance competing tribal and state interests in any given infringement problem is not exhaustive, it is more than adequate for purposes of this case. All of these considerations have previously been discussed at length in the preemption sections of this brief. It is submitted that the identification and quantification of the tribal and state interests in each of these respects leaves the State of Arizona with nothing to place on the balance. All the State of Arizona can point to here is the fact that the technical incidence of these taxes falls on a non-Indian. But that single factor can never be sufficient to reject a substantial claim of infringement since the very purpose of the infringement doctrine is to test the permissibility of applying state laws to non-Indians on the reservation.

A simple example of this mode of analysis, and a clearly correct application of the infringement doctrine, is found in *Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Commission,* 588 F.2d 75 (4th Cir. 1978) (petition for certiorari pending, No. 78-1653). That case held that the infringement doctrine prevented a state from applying its fishing regulations to and exacting its fishing license fees from non-Indians who fish on reservation streams stocked entirely by the tribe and by the federal government. The state had no part at all in this purely commercial fishery operation by the tribe:

> . . . [W]e can conceive of no possible interest of North Carolina in this purely commercial undertaking, while the stocking of the streams and the licensing of visiting fishermen by the Band is an established program of the Bands from which the Tribe itself and its members derives substantial economic benefits, benefits which are greatly diminished by North Carolina's enforcement of its own fishing licensing laws." 588 F.2d at 79.

Significantly, the Fourth Circuit does not uphold a general immunity of non-Indians from state fishing regulations on Indian reservations but rather upholds an immunity in the particular circumstances of the case before it under which the state can show "no possible interest" in intruding into and taxing non-Indian participation in the Tribe's "purely commercial undertaking."

Similarly, the State of Arizona has no conceivable interest in taxing the use by the Tribe through its agents of tribal and BIA roads not in any way supported by the state.

In summary, application of the infringement doctrine will be difficult in many cases since that doctrine rests on the achievement of general public values in the field of Indian affairs rather than in the application of precise legal rules. The possible difficulty of applying those general principles in marginal cases cannot disguise the fact that in this case all the public values to be accommodated by the doctrine weigh in favor of the tribal claim of infringement. The state has no equities at all here.

IV. THE HAYDEN-CARTWRIGHT ACT DOES NOT AUTHORIZE STATE TAXATION OF MOTOR FUEL USED ON TRIBAL ROADS, RATHER THAN STATE ROADS, ON INDIAN RESERVATIONS.

The Hayden-Cartwright Act, 49 Stat. 1519, 1521-22, originally enacted in 1936 and later amended in 1940 in § 7 of the Buck Act, 54 Stat. 1059, 1060-61, authorizes state motor

fuel taxes in certain federal reservations. It is now codified at 4 U.S.C. § 104 (1976).[34]

Though it made fleeting reference to this statute in the trial court, the State of Arizona has, with good reason we think, not thought this statute deserving of argument or even citation either in the Arizona appellate courts or in its Brief in Opposition to Petition for Writ of Certiorari filed in this Court. For the sake of completeness we wish to state summarily the reasons why this statute has no application to this case.

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[34] The act provides in pertinent part:
(a) All taxes levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, comissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State, Territory, or the District of Columbia, within whose borders the reservation affected may be located.

Even assuming this Act was intended to apply to Indian reservations,[35] the legislative history shows it was intended at most to permit state taxation of motor fuel used on state highways. Nothing suggests it was also meant to allow state taxation of fuel used on tribal roads by the tribe's own agents. The legislative history of the Act, which was originally passed as an amendment to the Federal Aid Highway Act of 1916, 39 Stat. 355, is conveniently given in *State of Minnesota v. Keeley*, 126 F.2d 863 (8th Cir. 1942). The Act originally passed the House without inclusion of what is now 4 U.S.C. § 104. That section was added to the bill as a floor amendment in the Senate at the request of Senator Hayden, who indicated that the amendment was being offered in response to a resolution adopted by the Western Association of State Highway Officials, which he read to the Senate. The amendment was adopted without further discussion.

[35] The Committee Reports and the floor debates on this statute do not show any reflection on the possible application of the Hayden-Cartwright Act to Indian reservations. The Hayden-Cartwright Act was amended by the Buck Act, 4 U.S.C. §§ 105 *et seq.* (1976), which broadened its effect to generally authorize the collection of state sales taxes, use taxes, and income taxes on federal enclaves. However, the Buck Act has been construed not to extend to Indian reservations. Thus, state taxation of the gross receipts of a non-Indian retailer on an Indian reservation is not authorized by the Buck Act. *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685, 691 n. 18 (1965); *accord*, *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 176 (1973) (which, interestingly, cites 4 U.S.C. § 104 as being part of the Buck Act—an accurate characterization in light of the Hayden-Cartwright Act's amendment by and integration into the more comprehensive Buck Act).

This holding with respect to the Buck Act would appear to apply to the Hayden-Cartwright Act as well since it was integrated into the Buck Act. The Senate Report on the Buck Act states:

> Section 7(a) of the committee amendment amends § 10 of the Hayden-Cartwright Act so that the authority granted to the states by such § 10 will more nearly conform to the authority granted to them under § 1 of this Act [the Buck Act].... S. Rep. No. 1625, 76th Cong. 3d Sess., 5 (1940).

The resolution of the state highway officials as read to the Senate clearly shows that the intent of the amendment was to end the unfairness of allowing certain users of public highways to escape paying their fair share of the gasoline taxes necessary to support those public highways. That resolution stated:

> Whereas this conference views with alarm the continued sale of motor vehicle fuels on Government military and other reservations, upon which no State Tax has been collected, *such tax-free fuel being used on the public highways* ... 80 Cong. Rec. 6913 (1936) (emphasis supplied)

Although there is no express reference to Indian reservations in the legislative history, it is obvious that to read the Hayden-Cartwright Act as permitting state taxation of fuel used on tribal roads would create a new unfairness while attempting to end an old one. The object of the Act was, simply put, to deprive a small class of users of state highways (people who purchase gasoline on military and other federal reservations) of an unjustifiable exemption from carrying their fair share of the cost of those state highways. This statute cannot be read as creating a precisely opposite unfairness: allowing the state highway system to reap windfall benefits from the use of tribal roads, which are not supported at all by state revenues, fuel taxes or any other taxes.

In any event, it should be recalled that in *Warren Trading Post*, this Court held in the alternative that even if the Buck Act otherwise consented to state sales taxation of non-Indians on Indian reservations, the Buck Act's consent would have to yield to the inharmonious congressional intent to free Indian reservation traders from state laws running at cross-purposes to the specific economic objectives of the Indian trader regulations. 380 U.S. at 691 n 18. Since state motor fuel taxation of the use of tribal roads in connection with tribal timber programs is similarly preempted by comprehensive federal regulation of the field, any general authorization of such taxation otherwise infer-

able from the Hayden-Cartwright Act must also yield to the preemptive intentions of Congress with respect to tribal timber use.

CONCLUSION

The judgment below should be reversed and remanded with instructions to grant judgment for the Petitioners for refund of the taxes paid under protest.

Respectfully submitted,

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November 15, 1979

INDEX TO ADDENDUM

A. *United States Constitution Art. I § 8*

The Congress shall have Power . . .

. . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

B. *United States Constitution Art. IV § 3*

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

C. *25 U.S.C. § 196 (1976)*

Sale or other disposition of dead timber

The President of the United States may from year to year in his discretion under such regulations as he may prescribe authorize the Indians residing on reservations or allotments, the fee to which remains in the United States, to fell, cut, remove, sell or otherwise dispose of the dead timber standing, or fallen, on such reservation or allotment for the sole benefit of such Indian or Indians. But whenever there is reasonable cause to believe that such timber has been killed, burned, girdled, or otherwise injured for the purpose of securing its sale under this section then in that case such authority shall not be granted.

D. *25 U.S.C. § 406 (1976)*

Sale of timber on lands held under trust—Deductions for administrative expenses; standards guiding sales

(a) The timber on any Indian land held under a trust or other patent containing restrictions on alienations may be sold by the owner or owners with the consent of the Secretary of the Interior, and the proceeds from such sales, after deductions for administrative expenses to the extent permissible under section 413 of this title shall be paid to the owner or owners or disposed of for their benefit under regulations to be prescribed by the Secretary of the Interior. It

is the intention of Congress that a deduction for administrative expenses may be made in any case unless the deduction would violate a treaty obligation or amount to a taking of private property for public use without just compensation in violation of the fifth amendment to the Constitution. Sales of timber under this subsection shall be based upon a consideration of the needs and best interests of the Indian owner and his heirs. The Secretary shall take into consideration, among other things, (1) the state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs, (2) the highest and the best use of the land, including the advisability and practicality of devoting it to other uses for the benefit of the owner and his heirs, and (3) the present and future financial needs of the owner and his heirs.

(b) Upon the request of the owners of a majority Indian interest in land in which any undivided interest is held under a trust or other patent containing restrictions on alienations, the Secretary of the Interior is authorized to sell all undivided Indian trust or restricted interests in any part of the timber on such land.

(c) Upon the request of the owner of an undivided but unrestricted interest in land in which there are trust or restricted Indian interests, the Secretary of the Interior is authorized to include such unrestricted interest in a sale of the trust of restricted Indian interests in timber sold pursuant to this section, and to perform any functions required of him by the contract of sale for both the restricted and the unrestricted interests, including the collection and disbursement of payments for timber and the deduction from such payments of sums in lieu of administrative expenses.

(d) For the purposes of this Act, the Secretary of the Interior is authorized to represent any Indian owner (1) who is a minor, (2) who has been adjudicated non compos men-

tis, (3) whose ownership interest in a decedent's estate has not been determined, or (4) who cannot be located by the Secretary after a reasonable and diligent search and the giving of notice by publication.

(e) The timber on any Indian land held under a trust or other patent containing restrictions on alienations may be sold by the Secretary of the Interior without the consent of the owners when in his judgment such action is necessary to prevent loss of values resulting from fire, insects, disease, windthrow, or other natural catastrophes.

E. *25 U.S.C. § 407 (1976)*

Sale of timber on unallotted lands

The timber on unallotted lands of any Indian reservation may be sold in accordance with the principles of sustained yield, or in order to convert the land to a more desirable use, under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales, after deductions for administrative expenses pursuant to section 413 of this title, shall be used for the benefit of the Indians who are members of the tribe or tribes concerned in such manner as he may direct.

F. *25 U.S.C. § 466 (1976)*

Indian forestry units; rules and regulations

The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

G. *25 U.S.C. § 476 (1976)*

Organization of Indian tribes; constitution and bylaws; special election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

H. *25 C.F.R. §§ 141.3 and 141.4 (1979)*

§ 141.3 Objectives.

(a) The following objectives are to be sought in the management of unallotted Indian forest lands in accordance with the principles of sustained yield:

(1) The preservation of such lands in a perpetually productive state by providing effective protection, by applying sound silvicultural and economic principles to the harvesting of the timber, and by making adequate provision for new forest growth as the timber is removed.

(2) The regulation of the cut in a manner which will insure method and order in harvesting the tree capital, so as to make possible continuous production and a perpetual forest business.

(3) The development of Indian forests by the Indian people for the purpose of promoting self-sustaining communities, to the end that the Indians may receive from their own property not only the stumpage value, but also the benefit of whatever profit it is capable of yielding and whatever labor the Indians are qualified to perform.

(4) The sale of Indian timber in open competitive markets in accordance with good business practices on reservations where the volume that should be harvested annually is in excess of that which is being developed by the Indians.

(5) The preservation of the forest in its natural state wherever it is considered, and the authorized Indian representatives agree, that the recreational or aesthetic value of the forest to the Indians exceeds its value for the production of forest products.

(6) The management of the forest in such a manner as to retain its beneficial effects in regulating water runoff and minimizing erosion.

(7) The preservation and development of grazing, wildlife, and other values of the forest to the extent that such action is in the best interest of the Indians.

(b) Similar objectives are sought in the management of allotted Indian forest lands, but, in addition, the sales of timber shall be based upon a consideration of the needs and best interests of the Indian owner and his heirs. The Secretary shall take into consideration, among other things:

(1) The state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs.

(2) The highest and best use of the land, including the advisability of devoting it to other uses for the benefit of the owner and his heirs.

(3) The present and future financial needs of the owner and his heirs.

§ 141.4 Sustained-yield management.

In accordance with the objectives set forth in § 141.3, the harvest of timber from Indian forest lands will not be authorized until there have been prescribed practical methods of cutting, based on sound silvicultural principles. Cutting schedules shall be directed toward the salvage of timber that is deteriorating as a result of fire damage, insect infestation, disease, over-maturity or other cause; and toward achieving an approximate balance between maximum net growth and harvest during each cutting cycle.

For all Indian reservations of major importance from an industrial forestry standpoint, management plans for the forest resource shall be prepared by the Bureau of Indian Affairs, and revised as needed. The plans shall contain a statement of the manner in which the policies of the Bureau of Indian Affairs are to be applied on the forest, with a definite plan of silvicultural management and a program of action, including a cutting schedule, for a specified period in the future.

I. *Amended Constitution and Bylaws of the White Mountain Apache Tribe of the Fort Apache Indian Reservation, Arizona* (Excerpts)

. . .

PREAMBLE

We, the White Mountain Apache Tribe of the Fort Apache Indian Reservation, Arizona, in order to form a more representative organization, to exercise the duties and responsibilities of a representative tribal government, to conserve and develop our tribal lands and resources for ourselves and our children, to provide a higher standard of living, better home life and better homes within the reservation to extend to our people the right to form business and other organizations, do adopt this Constitution and Bylaws as a guide to our self-governing program.

ARTICLE I - STATEMENT OF PURPOSE

Section 1. In our relation to the United States Government, a relation similar to that which a town or a county has to a State and Federal Government, our own internal affairs shall be managed, insofar as such management does not conflict with the laws of the United States, by a governing body which shall be known as the White Mountain Apache Tribal Council.

ARTICLE II - TERRITORY

The authority of the White Mountain Apache Tribe, of Arizona, shall extend to all of the territory within the exterior boundaries of the Fort Apache Indian Reservation as established by the Act of Congress, June 7, 1897, and to such other lands as the United States may acquire for the benefit of the tribe, or which the tribe may acquire for itself.

. . .

ARTICLE V - POWERS OF THE COUNCIL

Section 1. In addition to all powers vested in the White Mountain Apache Tribal Council by existing law, the White Mountain Apache Tribal Council shall exercise the following powers, subject to any limitations imposed by the

Consitution or the Statutes of the United States applicable to Indians or Indian tribes, and subject further to all expressed restrictions upon such powers contained in this constitution and bylaws:

(a) To represent the tribe and act in all matters that concern the welfare of the tribe, and to make decisions not inconsistent with or contrary to this Constitution and Bylaws of the Constitution and Statutes of the United States applicable to Indians or Indian tribes.

(b) To negotiate, make and perform contracts and agreements of every description, not inconsistent with law or this Constitution and subject to the review and approval of the Secretary of the Interior where such review or approval is required by statute or regulation, with any person, association, or corporation, with any municipality or any county, or with the State of Arizona or the United States, including agreements with the State of Arizona for rendition of public services.

. . .

(e) To veto the sale, disposition, lease or encumbrance of tribal lands, interests in lands, tribal funds or other tribal assets that may be authorized by any agency or employee of the Government.

(f) To protect and preserve the wildlife, natural resources and water rights of the tribe, to regulate hunting and fishing on the reservation.

(g) To cultivate Indian arts, crafts, and cultures.

(h) To regulate the uses and disposition of tribal property.

(i) To manage all economic affairs and enterprises of the tribe including tribal lands, timber, sawmills, flour mills, community stores, and any other tribal activities.

(j) To accept grants or donations from any person, State or the United States.

(k) To appropriate tribal funds for tribal purposes and to expend such funds in accordance with an annual budget approved by the Secretary of the Interior.

(l) To borrow money from any source and pledge or assign chattels or future tribal income as security therefor, subject to the review and approval of the Secretary of the Interior.

(m) To provide by ordinance for the assignment, use or transfer of tribal lands within the reservation.

(n) To enact ordinances subject to review and approval by the Secretary of the Interior covering the granting of both surface and subsurface leases for such periods as are permitted by law.

(o) To levy and collect taxes and to impose license fees, subject to review and approval by the Secretary of the Interior, upon members and non-members doing business within the reservation.

. . .

(q) To enact ordinances, subject to review and approval by the Secretary of the Interior, establishing and governing tribal courts and law enforcement among Indians on the reservation, regulating domestic relations of members of the tribe, but all marriages and divorces shall be in accordance with State laws, providing for appointment of guardians for minors and mental incompetents, regulating the inheritance of non-restricted real and personal property of members of the tribe within the reservation, and providing for the removal or exclusion from the reservation of any non-member of the tribe whose presence may be injurious to the people of the reservation.

(r) To enact ordinances governing the activities of voluntary associations consisting of members of the tribe organized for purposes of cooperation or other purposes.

(s) To regulate its own procedures, to appoint subordinate committees, commissions, boards, advisory or otherwise, tribal officials and employees not otherwise provided for in this Constitution and Bylaws and to regulate subordinate organizations for economic and other purposes.

(t) The Tribal Council of the White Mountain Apache Tribe may exercise such further powers as may be delegated to the Council by members of the tribe or by the Secretary of the Interior, or any other duly authorized official or agency of the State or Federal Government.

(u) The foregoing enumeration of powers shall not be construed to limit the powers of the White Mountain Apache Tribe.

J. ***Ariz. Rev. Stat. Ann.*** *§ 28-1551 (1979 Supp.)*
Definitions

In this article, unless the context otherwise requires:

. . .

3. "Fuel tank" means any receptacle on a motor vehicle from which fuel is supplied for the propulsion of the vehicle, exclusive of a cargo tank. A fuel tank includes a separate compartment of a cargo tank used as a fuel tank and any auxiliary tank or receptacle of any kind from which fuel is supplied for the propulsion of the vehicle, whether or not such tank or receptacle is directly connected to the fuel supply line of the vehicle.

4. "Highway" means any way or place in this state of whatever nature, open to the use of the public, for purposes of traffic, including highways under construction.

5. "In this state" means within the exterior limits of the state of Arizona and includes all territory within these limits owned by or ceded to the United States of America.

6. "License" means use fuel tax license.

7. "Motor vehicle" means any self-propelled vehicle required to be licensed or subject to licensing for operation upon the highways.

8. "Person" means any individual, firm, partnership, joint venture, association, corporation, estate, trust, business trust, receiver, syndicate, this state, any county, municipality, district or other subdivision thereof, or any other group or combination acting as a unit.

9. "Sell" includes any transfer of title or possession, exchange or barter, in any manner or by any means whatsoever.

10. "Use" includes the placing of fuel into any receptacle on a motor vehicle from which fuel is supplied for the propulsion of the vehicle unless the operator of the vehicle establishes to the satisfaction of the director that the fuel was consumed for a purpose other than to propel a motor vehicle on the highways of this state and, with respect to fuel brought into this state in any such receptacle, the consumption of the fuel in this state. A person placing fuel in a receptacle on a motor vehicle of another who holds a valid use fuel tax license is not deemed to have used the fuel.

11. "Use fuel" includes all gases and liquids used or suitable for use to propel motor vehicles, except such fuels as are subject to the tax imposed by article 1 of this chapter.[1]

12. "User" includes any person who, within the meaning of the term "use" as defined in this article, uses fuel.

K. ***Ariz. Rev. Stat. Ann.*** *§ 28-1552 (1979 Supp.)*
Imposition of Tax

For the purpose of partially compensating the state for the use of its highways, an excise tax is imposed at the rate of eight cents per gallon upon use fuel used in the propulsion of a motor vehicle on any highway within this state,

such tax to be collected and remitted to this state or paid to this state as follows:

1. By a vendor, measured by the volume of use fuel:

(a) Delivered by the vendor into the fuel tank of a motor vehicle not operated by the vendor, or

(b) Used by the vendor on the highways of this state in the propulsion of a motor vehicle operated by the vendor.

2. By a user, measured by the volume of use fuel imported into this state or acquired without payment of tax to a vendor within this state, and used in the propulsion of a motor vehicle on the highways of this state.

3. The tax, with respect to fuel acquired by any fuel user in any manner other than delivery by a vendor into a fuel tank of a motor vehicle, shall attach at the time of the consumption of such fuel in the propulsion of a motor vehicle upon the highways of this state, and shall be paid over to the director by the fuel user with the report required and in accord with other applicable provisions of this article.

L. ***Ariz. Rev. Stat. Ann*** *§ 28-1556 (1979 Supp.)*
Presumption of use

A. For the proper administration of this article, and to prevent evasion of the excise tax, it shall be presumed, until the contrary is established by competent proof under rules and procedures the director adopts, that all use fuel received into any receptacle on a motor vehicle from which fuel is supplied to propel such vehicle, is consumed in propelling the vehicle on the highways of this state.

M. ***Ariz. Rev. Stat. Ann.*** *§ 40-601 (1974)*
Definitions

A. In articles 1 and 2 of this chapter, unless the context otherwise requires:

. . .

7. "Contract motor carrier of property" means any person engaged in the transportation by motor vehicle of property, for compensation, on any public highway, and not

included in the term common motor carrier of property, and, for the purpose of taxation, the owner of any motor vehicle in excess of six thousand pounds unladen weight who leases, licenses or by any other arrangement permits the use of such vehicle by any other, other than a common or contract carrier subject to tax under articles 1 and 2 of this chapter, for the transportation of property upon the public highway for compensation or in the furtherance of any commercial or industrial enterprise.

8. "Motor carrier" means any common motor carrier of property or passengers, or any contract motor carrier of property or passengers.

9. "Motor vehicle" means any automobile, truck, truck tractor, trailer, semi-trailer, motor bus or any self-propelled or motor driven vehicle used upon any public highway of this state for the purpose of transporting persons or property,[2] except farm tractors, implements of husbandry and other vehicles designed primarily for or used in agricultural operations and only incidentally operated or moved upon a highway, which shall be exempt from the provisions of this chapter.

10. "Private motor carrier" means any person not included in the term "common motor carrier" or "contract motor carrier" who transports by any motor vehicle in excess of six thousand pounds unladen weight property of which such person is the owner, lessee or bailee, when such transportation is for the purpose of sale, lease, rent or bailment, or in the furtherance of any commercial enterprise, but ownership of the property transported shall not be accepted as sufficient proof of a private motor carrier operation if the carrier is in fact engaged in the transportation of property for hire, compensation or remuneration, or if such transportation operations are conducted for profit and not merely as an incident to a commercial enterprise, provided that towing of disabled vehicles by tow trucks operated in connection with an automobile repair or service business or a wrecking yard shall be deemed to be incidental to a commercial enterprise, and the operator thereof shall be deemed to be a private motor carrier when engaged in such operations, and provided that transporting of pulpwood logs which are consumed in the manufacture of pulp or paper within the state of Arizona by a person in the business of harvesting such pulpwood logs shall be deemed to be incidental to a commercial enterprise and a pulpwood harvester transporting such pulpwood logs shall be deemed to be a private motor carrier when so engaged. For purposes of this paragraph "pulpwood logs" means logs which are used or intended for use as a raw material in the manufacture of pulp or paper.

11. "Public highway" means any public street, alley, road, highway or thoroughfare of any kind used by the public, or open to the use of the public as a matter of right for the purpose of vehicular travel.

12. "Superintendent" means the superintendent of the motor vehicle division of the department of transportation.

N. ***Ariz. Rev. Stat. Ann.*** *§ 40-641 (1979 Supp.)*

License tax upon motor carriers; collection; disposition

A. In addition to all other taxes and fees:

1. Every common motor carrier of property and every contract motor carrier of property shall pay to the state, on or before the twenty-fifth day of each month, a license tax of two and one-half per cent of the gross receipts from the carrier's operations within the state for the preceding calendar month, excluding receipts from property transported under a star route contract with the federal government. The gross receipts from the operation for hire by a common motor carrier of property or a contract motor carrier of property of a farm tractor or implements of husbandry exempt from registration, whether incidental to the operations as such motor carrier or otherwise, shall not be subject to the tax imposed by, or other provisions of, this article.

2. Every common motor carrier of passengers and every contract motor carrier of passengers shall pay to the state, on or before the twenty-fifth day of each month, a license tax of two and one-quarter per cent of the gross receipts from his operations within the state for the preceding calendar month. The gross receipts from operation of public service corporations providing urban mass transportation service within urban areas and public transportation systems or services provided by counties, cities and towns or their contractors as authorized by chapter 6, article 5 of this title shall not be subject to the tax imposed by, or other provisions of, this article. The only gross receipts of a public service corporation providing urban mass transportation service within urban areas that shall not be subject to the tax imposed by this article shall be those gross receipts obtained from providing passenger urban mass transportation within the urban area.

B. When any carrier operates partly within and partly without the state, the gross receipts of the carrier within the state shall be deemed to be all receipts of business beginning and ending within the state, and a proportion based upon the proportion of the mileage within the state to the entire mileage over which business is done, of receipts on all business passing through, into or out of the state.

C. Upon receipt of the taxes the department of transportation shall forthwith transmit them to the state treasurer, who shall credit them to the Arizona highway user revenue fund.

FOR ARGUMENT

In The
Supreme Court of the United States

October Term, 1979

No. 78-1177

WHITE MOUNTAIN APACHE TRIBE, et al.,

Petitioners,

v.

ROBERT M. BRACKER, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIV. ONE

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

INTRODUCTION

The Respondents have no fundamental quarrel with the Statement of the Case submitted by the Petitioners Pinetop Logging Co. (hereinafter "Pinetop") and White Mountain Apache Tribe (hereinafter "WMAT"), with a few notable exceptions.

First, while the Statement of the Case is "... rich in detail ..." (Brief for Petitioners, p. 5), in some respects it occasionally makes legal arguments instead of factual recitations and contains some inaccuracies, albeit most likely as a result of typographical errors. For example, at p. 8, the Petitioners reference 1971 as being the year wherein the net

profit from all WMAT tribal enterprises was $1,667,091, of which $1,508,713 was derived from its Fort Apache Timber Company (hereinafter "FATCO") operations. The correct year is 1973, not 1971. (*See* App. 15).

Moreover, the Petitioners frequently characterize Pinetop as being an "agent" of the tribe rather than an "independent contractor." The Petitioners' characterizations of Pinetop as being an "agent" are inconsistent with its contentions in the Petition for Writ of Certiorari (Pet., p. 6) and with its verified complaint in the Arizona proceedings (Pet.App., p. 5a (¶ix)). Pinetop's operations as a log-hauling contractor are conducted pursuant to various contracts executed between Pinetop and FATCO and are approved by, if not actually drafted by, the Bureau of Indian Affairs (hereinafter "BIA") (A.9-10, 17).

In an attempt to address the issues raised by the Petitioners, as well as those of the United States as amicus curiae, in a unified fashion, the Respondents will treat the arguments of both in a single brief.

SUMMARY OF ARGUMENT

It is the Respondent state officials' position that the Arizona use fuel tax (Ariz. Rev. Stat. § 28-1552; Pet.App. 60a-61a) and the Arizona motor carrier tax (Ariz. Rev. Stat. § 40-641; Pet.App. 63a-64a) are properly applied to the non-Indian, independent log-hauling contractor, Pinetop Logging Co., and that these state taxes are preempted by neither the federal statutes governing Indian reservation forestry programs nor the federal regulations promulgated to implement said statutes.

Moreover, these state taxes constitute neither an infringement of Indian tax immunities nor a threat to Indian self-government under either *Williams v. Lee*, 358 U.S. 217 (1959) or *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973). On the contrary, there is nothing in either of those cases to suggest that Congress intended to

preempt these state taxes or to grant tax immunities to a non-Indian independent log-hauler who has entered into contracts such as those existing between Pinetop and WMAT.

Finally, the legislative history of both the Hayden-Cartwright Act (4 U.S.C. § 104) and the Buck Act (4 U.S.C. §§ 105-110), when viewed in connection with the *McClanahan* case, demonstrates that these state taxes are properly imposed and that this Court's decision in *Warren Trading Post Company v. Arizona State Tax Commission*, 380 U.S. 685 (1965) stands as no obstacle to the continued levy of the taxes upon Pinetop.

Accordingly, the lower court's judgment should be affirmed.

I

NONE OF THE FEDERAL LAWS OR REGULATIONS IN QUESTION PREEMPT THE STATE TAXES HEREIN

A. Established doctrines of federal preemption of state laws as articulated by this Court confirm that the state taxes herein have not been preempted.

If there be a single, major thesis discernable in the Brief for Petitioners, as well as in that of the United States as amicus curiae, it is this: the purportedly all-pervasive, comprehensive and exclusive federal scheme dealing with Indian reservation forestry operations ousts the states of jurisdiction to tax non-Indian contractors with whom either the Indians or the Bureau of Indian Affairs (BIA) may contractually deal in connection with the accomplishment of the various forestry operation objectives. The depth of the preemption, so the contention goes, is such that there is absolutely no room left within which such state laws — re-

gardless of either the magnitude of their economic effect or the nature of their substantive legal incidence — may continue to operate. An examination of the viability of this premise therefore seems appropriate.

To begin with, concepts of federal preemption, while occasionally traceable to various ancillary constitutional provisions, have as their common source Article 6, Section 2 of the Constitution: the Supremacy Clause. *DeCanas v. Bica*, 424 U.S. 351, 356 (1976); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141-152 (1963). While this section mandates that federal enactments shall be the supreme law of the land, there remains for examination the reach and scope of the federal law vis à vis potentially conflicting or inconsistent state laws.

Accordingly, this Court has stated that constant vigilance is necessary to insure that the application of state law poses "... no significant threat to any identifiable federal policy or interest ...," *Burks v. Lasker*, ___ U.S. ___, 99 S.Ct. 1831, 1838 (1979), quoting *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966), that the actual or asserted clash between the state and federal law "... be of substance and not merely trivial or insubstantial ...," *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 423 n.20 (1973) and that, since preemption of a state law "... is not lightly to be presumed ...," *Dublino, supra* at 413 quoting *Schwartz v. Texas*, 344 U.S. 199, 202-203 (1952), it can occur only when the relationship between the state and federal laws is "... absolutely and totally contradictory and repugnant ...," *Goldstein v. California*, 412 U.S. 546, 553 (1973).

In this regard, while a substantial, actual and irreconcilable conflict between federal law and state law may, upon the facts of individual cases, provide a basis for preemption, *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977), this Court has repeatedly expressed its reluctance to infer federal preemption of state laws in the absence of a clear and unmistakable manifestation of such intent by Congress. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978); *DeCanas v. Bica, supra* at 357-358 n.5; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1975).[1] Thus, where Congress manifests its intention to circumscribe its regulation and thereby preempt a limited area, state laws which properly exist and operate beyond the federal sphere are not "... forbidden or displaced ...," *Kelly v. Washington*, 302 U.S. 1, 10 (1937).

With this backdrop of information, the limits of the inquiry in the case *sub judice* come more sharply into focus. If, as Pinetop, WMAT and the United States contend, there is contained within the federal laws and regulations herein a clearly manifested congressional intent to forbid these state taxes as constituting a significant, substantial and repugnant threat to Indian forestry operations, the dispute is at an end, the Petitioners and amicus curiae are right and the lower court ruling should be reversed. However, unless such a specific intent is found, these state taxes should be permitted continued operation. The Petitioners' advocation of a rule of inferred preemption under *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685 (1965), Brief for Petitioners, p. 21, must therefore be scrutinized against the backdrop of preemption cases decided by this Court subsequent to *Rice v. Santa Fe Ele-*

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[1] This reluctance — with some notable exceptions (*e.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)) — has continued for many years and has been articulated in a wide variety of cases. *See, e.g. Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *H.P. Welsh Co. v. New Hampshire*, 306 U.S. 79 (1939); *Mintz v. Baldwin*, 289 U.S. 346 (1933). *See also, generally*, Note, "The Preemption Doctrine," 75 Colum.L.Rev. 623 (1975).

vator Corp., 331 U.S. 218 (1947). An examination of the federal provisions alleged by the Petitioners to be controlling reveals that the rule of inferred preemption so sought is not only unavailable, it is nonexistent.

B. The federal laws and regulations relied upon by the Petitioners are concerned with a field of activity other than state taxes levied upon non-Indian log-haulers on reservations.

As Pinetop and WMAT exhaustively contend,[2] the objective of the federal laws and regulations is multifaceted. However, 25 C.F.R. § 141.3 sets forth the major goals of the forestry program as to both allotted and unallotted Indian forest lands. Among these objectives are the preservation of the forest lands in a perpetually productive state through the application of "... sound silvicultural and economic principles to the harvesting of the timber ..." (25 C.F.R. § 141.3(a) (1)), the development of these forests to the end that the Indians will receive the "stumpage value"[3] of the timber as well as "... whatever profit it is capable of yielding ..." (25 C.F.R. § 141.3(a) (3))[4] and the sale of Indian timber "... in open competitive markets in accordance with good business practices ..." (25 C.F.R. § 141.3(a) (4)).

[2] The United States so asserts as well, but more succinctly.

[3] "Stumpage value" is defined in 25 C.F.R. § 141.1(c) as the "... value of uncut timber as it stands in the woods."

[4] Pinetop and WMAT improperly equate the concept of "whatever profit" a commercial enterprise is capable of yielding with the somewhat dissimilar notion of "... entire financial benefit ..." of such an operation. *See* Brief for Petitioners, pp. 17, 46-47. By this contention the Petitioners seem to suggest that *any* costs of Pinetop which in one fashion or another affect FATCO's maximum imaginable profit are forbidden. The apparent justification for this argument is that, without regard to the magnitude of the economic burden of Pinetop's taxes contractually borne by FATCO, their source (a state tax on a non-Indian) as opposed to their nature (one among a multitude of costs borne by the non-Indian) renders them impermissible. Such a contention is at odds with several other relevant federal provisions. *See, e.g.*, 25 U.S.C. § 413 and 25 C.F.R. § 141.18 providing for the deduction of reasonable administrative expenses from the gross proceeds of tribal timber sales.

Pinetop, WMAT and the United States dwell at some length in their respective briefs over additional silvicultural and related aspects of these forestry provisions.[5] But when all is said and done, the image that emerges is not one compelling the conclusion that Congress intended to prohibit the imposition of these taxes. On the contrary, the picture is one of a federal objective of protecting the Indian forest resource while recognizing — rather than ignoring — that the tribal forestry operations do not exist in a vacuum, free of any and all external influences which might, in one way or another, indirectly and/or trivially affect the ultimate mode of the program and/or its result. *See* Arguments II, III, *infra*.

In this regard, the regulations contemplate not the realization of the highest imaginable profit, *viz.*, the gross economic benefit. Rather, they envision the existence of the tribal program as a part of its larger existence in society as a whole. Significantly, there is no discernable intent to set prices for the timber (subject to 25 C.F.R. § 141.3(a) (4)) or to forbid the recovery of costs by contractors who deal with the Indians or the BIA on their behalf. On the contrary, quite the opposite appears to have been intended. *See, e.g.*, 25 U.S.C. § 413; 25 C.F.R. § 141.18. Under these circumstances, the basis for the Petitioners' reliance on *Warren* becomes obscure.

[5] Such additional aspects include, for example, cutting restrictions (25 C.F.R. § 141.5), bid requirements (25 C.F.R. § 141.11), bonds (25 C.F.R. § 141.14), fire protective measures (25 C.F.R. § 141.21) and so on. Similar, though not identical considerations characterize the provisions of 25 C.F.R. Part 142. However, *cf.* United States Amicus Curiae Brief, p. 17, n.12, suggesting that 25 C.F.R. Part 142 might not apply to FATCO lumber sales. The Petitioners (but not the United States) cite *In re Humboldt Fir, Inc.*, 426 F. Supp. 292, 296 (N.D. Cal. 1977) (*see* Brief for Petitioners, p. 46 n.31) in support of their position. The case is without materiality herein as the issue involved tribal rights as a creditor in bankruptcy court rather than state taxation of a non-Indian dealing with a tribal enterprise.

This is not to suggest, however, that because the tribal operation, FATCO, has seen fit to deal with a non-Indian logging contractor such as Pinetop, that, for that reason, the taxes in question are not preempted and may continue in operation. Rather, the point is simply that the federal sphere of concern is not invaded through the application of these taxes. If the contrary were the case, Congress could have easily spoken its intent by prohibiting all state occasioned expenses — not just the taxes here in question — which might affect a non-Indian log-hauler's ability to complete its contractual obligations for the tribe and/or the BIA for a consideration as close to a gratuity as possible.

Such an objective, of course, is neither practical nor desirable: if a non-Indian with whom the Indians or the BIA may deal by way of contract is prohibited from reimbursing himself for his costs, whether they be in the form of labor expenses, equipment expenditures or similar "overhead", he may refuse to deal with either. But this circumstance can in no way serve as rational justification for the extrapolated conclusion that the non-Indian's contractual attempt to seek recompense for one of his costs operates, *nunc pro tunc*, to eliminate the source of the cost itself.

For example, if Pinetop and FATCO had structured their relationship so that the log-hauling contracts had been between Pinetop and the BIA, the latter conducting the negotiations for FATCO and/or WMAT under its asserted plenary powers to control Indian forestry operations, would the economic burdens of the state taxes as levied herein upon Pinetop have been impermissible? Moreover, would the economic burdens of the state taxes levied upon Pinetop with respect to which there is no protest have been similarly prohibited?[6] If consistency is to characterize Pinetop's theory, then the answer must be that these ex-

[6] Pinetop states that it kept accurate records of the mileage it traversed on state highways within the Fort Apache Indian Reservation and that the state taxes "... allocable to those uses have been paid without protest ..." (Brief for Petitioners, p. 13).

penses are similarly forbidden, for they decrease the "... entire economic benefit ..." by increasing the costs to the BIA, thereby creating the potential for the deduction of greater sums from the gross receipts from timber sold under 25 C.F.R. § 141.18. Under decisions of this Court such as *United States v. County of Fresno*, 429 U.S. 452 (1977), *Gurley v. Rhoden*, 421 U.S. 200 (1975), and *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937),[7] the economic burdens of the taxes, when contractually "passed on" to this federal agency (BIA), would not be preempted. *Cf. In The Matter of State Motor Fuel Tax Liability of A.G.E. Corp.*, 273 N.W.2d 737 (S.Dak. 1978), citing with approval *Department of Revenue v. Hane Construction Co., Inc.*, 115 Ariz. 243, 564 P.2d 932 (Ct.App. 1977), the former case being cited and discussed by the United States as amicus curiae (United States Amicus Curiae Brief, p. 21, n.13) in an attempt to distinguish it from the instant case.

While the foregoing discussion may at first glance appear to have more relevance to questions involving infringement and Commerce Clause theories, under Article 1, Sec. 8,[8] it is also germane to the issue of preemption. As heretofore noted, the determination as to whether or not a federal enactment preempts state law turns upon a number of varied yet interrelated factors. These considerations include analyses of whether the purportedly forbidden state law constitutes a *significant* threat to an identifiable federal policy[9] or whether its effect is trivial or insubstantial insofar as the integrity of the preempted federal sphere is

[7] *See, also*, 58 I.D. 562, 566 (1943), discussing the relationship between the decision in *Superintendent v. Commissioner*, 295 U.S. 418, 421 (1935), and the appropriate resolution of the question of whether or not the economic burdens of state taxes which increase the cost to the Federal Government of goods purchased for the Indians render the levy of the taxes upon a non-Indian vendor invalid in the first place: the conclusion was that they do *not* so invalidate the tax.

[8] *See*, Arguments II, III, *infra*.

[9] *Burks v. Lasker, supra*, 99 S.Ct. at 1838.

concerned.[10] In this regard, and by way of illustrative example, a brief analysis of one discrete aspect of the various arguments advanced by Pinetop, WMAT and the United States may prove enlightening.

Both Pinetop and WMAT contend that the two taxes in question, levied by state law upon the non-Indian taxpayer, Pinetop, and by that entity characterized as a business cost to be contractually "passed on" to FATCO,[11] are preempted and prohibited because, among other reasons, the magnitude of their economic burden (purportedly some $9,000 on an annual average) is speculative and "... not grounded in the evidence of record ...," the actual economic effect assertedly being "... many times greater than the state court was willing to acknowledge."[12] The United States as amicus curiae adopts the same position, observing somewhat critically that the assumed $9,000 figure was viewed by the Arizona courts as being a *de minimus* burden.[13]

However, an examination of the record will reveal that for example, in 1973, actual figures *do* exist and, indeed, are derived *in toto* from verified allegations and affidavits made by Pinetop and WMAT. In 1973, Pinetop paid under protest Arizona (1) use fuel taxes in the sum of $5,018.97 and (2) motor carrier taxes of $2,770.61.[14] The Chairman of the White Mountain Apache Tribal Council, Fred Banashley, avowed that, during that same one-year period, the

[10] *New York State Department of Social Services v. Dublino, supra,* 413 U.S. at 423, n.20.

[11] These costs are "shifted" by Pinetop to FATCO as a normal incident of contractual negotiation: there is no requirement of state law that the legal liability for these taxes be shifted over to or the tax itself collected from either FATCO, WMAT or the BIA. Thus, quite properly, there is no serious contention by either Pinetop, WMAT or the United States that the legal incidence of these taxes — as opposed to the contractual economic incidence — falls upon any entity other than Pinetop.

[12] Brief for Petitioners, pp. 16, 45.

[13] United States Amicus Curiae Brief, p. 23.

[14] *See* (1) Pet. App., p. 2a and (2) Record on Appeal, Plaintiffs' Exhibits "A" and "B", Item 15, pp. 15a, 15b.

FATCO operations generated a net profit of $1,508,713 out of a total net profit from all WMAT tribal enterprises of $1,667,091.[15]

From the foregoing, basic arithmetic reveals that, during 1973, the ratio of Pinetop's use fuel tax, motor carrier tax and combined use fuel/motor carrier tax to FATCO's and WMAT's total net profits ranged, respectively, from a *high* of 0.52% to a *low* of 0.17%.[16] Stated otherwise, the *maximum* calculable economic impact that both of these taxes had upon FATCO's and/or WMAT's *net* profits for that year amounted to some one-half of one percent. By way of comparison, the *minimum* administrative charge which could be levied upon the *gross* receipts to FATCO from timber sales pursuant to 25 C.F.R. § 141[illegible]8 would have been 5% of said gross, or at least some ten times higher than the highest percentage possible under the foregoing, actual figures.

The Respondents would respectfully suggest that these contractually assumed costs are something less than that which could reasonably be expected to "... [bleed] the White Mountain Apache Tribe's timber program of too much of its financial strength and ... [bring] it 'to its knees'. " *Cf.* Brief for Petitioners, pp. 45-46. The State

[15] *See* Banashley affidavit, (App. p. 15). In an apparent typographical error, Pinetop and WMAT erroneously assert (Brief for Petitioners, p. 8) that these figures relate to the year 1971; Mr. Banashley's affidavit establishes that the correct year in question is 1973, not 1971.

[16] *Viz.:*
1 (A) Pinetop use fuel tax/FATCO net profit: 0.003327
(B) Pinetop use fuel tax/all WMAT net profit: 0.003011
2 (A) Pinetop motor carrier tax/FATCO net profit: 0.001836
(B) Pinetop motor carrier tax/all WMAT net profit: 0.001662
3 (A) Pinetop combined (1 + 2) / FATCO net profit: 0.005163
(B) Pinetop combined (1 + 2) / all WMAT net profit: 0.004673

would further note that it does *not* urge that the insubstantiality of the economic burden of a non-Indian's tax contractually borne by an Indian constitutes, by itself, justification for the levy of the tax to begin with. However, where the magnitude of that burden, however calculated, never exceeds some one-half of one percent of the *net* profit of the Indian enterprise purportedly crippled by that cost, it is somewhat incongruous to suggest, as do Pinetop and WMAT, that, upon those grounds, the tax constitutes a substantial threat to the accomplishment of the federal objectives and/or infringes upon the Indians' right of self-government under *Williams v. Lee*, 358 U.S. 217 (1959).

Finally, while more will be said about the case in subsequent sections of this brief, the decision in *Warren Trading Post Company v. Arizona State Tax Commission*, 380 U.S. 685 (1965) is not only legally and factually distinguishable from the present dispute, the rationale of that case fails to support the conclusion that the state use fuel and motor carrier taxes herein are preempted. *Warren* was decided upon the grounds that a non-Indian, federally licensed Indian trader was so pervasively regulated by federal law that his business activities could not be subjected to the Arizona transaction privilege tax. The tax, this Court held, would impose burdens upon the trader or the Indians in addition to those prescribed by Congress or the tribes. The resultant effect, the decision held, would be to impermissibly disrupt the federal objective of protecting Indians from unfair or unreasonable price depredations at the hands of the traders.

In the present case, the federal objective is quite different, emphasizing protection of the forest resource and promotion of tribal forestry programs in a context recognizing the role of non-Indian contractors in effectuating this goal. The law and regulations relied upon by Pinetop, WMAT and the United States contain no ascertainable intention to either insulate non-Indians from nondiscriminatory state taxes or shield Indians or the BIA from each and every cost which might somehow touch the forestry

operation. Indeed, 25 C.F.R. § 141.18 indicates that just the opposite was intended by Congress. *See also* App., p.17, wherein Pinetop's contract establishes its responsibility for taxes.

The holding in *Warren*, therefore, is not controlling in the present case. As the analysis of the *Warren* reasoning set forth hereafter will demonstrate, these state taxes offend neither Article 6, Section 2 (the Supremacy Clause) nor Article 1, Section 8, Clause 3 (the Commerce Clause). While the federal tribal forestry programs seek to protect the physical well-being of the timber as well as attempt to foster whatever economic benefits the sale of the forest products may, within the context of Anglo-American society, generate for the Indians, there is no identifiable congressional intent to preempt state laws which may affect non-Indian contractors retained to assist in the endeavor.

Accordingly, the state taxes in question should not be declared superseded and the Arizona Court of Appeals' judgment to this effect should be affirmed.

II

THERE IS NO IMPERMISSIBLE INFRINGEMENT UPON TRIBAL SELF-GOVERNMENT

The corollary to the Petitioners' argument that the state laws in question have been preempted is the assertion that, under *Williams v. Lee*, 358 U.S. 217 (1959), their continued operation will violate the doctrine that, absent governing acts of Congress, state laws should not be permitted to infringe upon the right of reservation Indians to make their own laws and be ruled by them. The kindred assertion is made that, under *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973), the imposition of these taxes upon Pinetop, a non-Indian, results in an infringement upon the right of FATCO and WMAT, Indian entities, to self-govern because of the adverse effect occasioned by the contractual assumption of their economic burden by FATCO. It is the State's position that not only is the Petitioners' parade of horribles composed of largely illusory

concerns, even if actual effects of these taxes are felt by FATCO or WMAT, they do not infringe upon any right of self-government otherwise enjoyed by the Indians.

At this point, and by way of prefatory explanation, it is the Respondents' position that the issues herein are far more subtle, complex and difficult to resolve than suggested by the briefs of Pinetop, FATCO or the United States. Reliance upon generalized notions of federal preemption and the holding in *Warren*, it is respectfully submitted, are insufficient, standing alone, to support a thorough, objective and rational solution to the dispute. Thus, a somewhat detailed documentation of the cases and other authorities believed to validate the Respondents' arguments is deemed required. While the Respondents have attempted to limit the following discussion, they remain committed to the proposition that the correct analysis of the problem necessitates the detailed examination to follow.

Accordingly, and in this regard, this Court has frequently invalidated state taxes which, by the terms of the state statutes themselves — as distinguished from the terms of contractual agreements (express or implied) existing between Indians and non-Indians with whom they deal — place the direct legal incidence and liability for the tax upon the Indian.[17] Just as frequently, however, the Court

[17] *See, e.g., Bryan v. Itasca County*, 426 U.S. 373 (1976); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976); *McClanahan v. State Tax Commission of Arizona, supra.*

has upheld the imposition of state taxes which are confined in their legal, as opposed to economic incidence, to non-Indians.[18]

Moreover, in a wide variety of cases which have come before this Court seeking review by way of certiorari or appeal, only to have certiorari denied or the appeal dismissed for want of a substantial federal question,[19] lower court rulings upholding the levy of state taxes upon non-Indians have been allowed to stand despite certain resultant adverse economic ramifications, either actual or potential, to reservation Indians or Indian tribes or

[18] *See, e.g., Moe v. Confederated Salish and Kootenai Tribes, supra; Montana Catholic Missions v. Missoula County*, 200 U.S. 118 (1906); *Wagoner v. Evans*, 170 U.S. 588 (1898); *Thomas v. Gay*, 169 U.S. 264 (1898); *Utah & Northern Ry. Co. v. Fisher*, 116 U.S. 28 (1885). Indeed, where the state tax is applied to activities *beyond* the limits of Indian reservations, general, non-discriminatory state taxes may be directly imposed upon Indians. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); 57 I.D. 124, 126 (1940); 58 I.D. 562, 567 (1943).

[19] While the denial of certiorari is not to be viewed as an expression of opinion on the merits of a case, *United States v. Carver*, 260 U.S. 482 (1923), the dismissal of an appeal for want of a substantial federal question is to be viewed as a ruling on the merits. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). *But see State of Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, ___ U.S. ___, 99 S.Ct. 740, 749-750 n.20 (1979).

bands.[20] And the same result is reflected in various state court decisions where review by this Court was sought by neither the non-Indian taxpayer, the Indians with whom it dealt nor the federal agency involved on behalf of the Indians.[21]

The rules articulated in these cases — involving questions of the taxability of non-Indians who deal with Indians — are, from a conceptual tax standpoint, indistinguishable from the many decisions of this Court upholding the imposition of state taxes (chiefly business excise privilege or sales taxes) upon non-Indian persons or entities who deal with the ultimate sovereign in this nation, the United States of America. These cases, in clear and unambiguous terms, establish that, where the legal incidence of a state tax is imposed upon a business entity which thereafter contractually "shifts" the economic burden or cost of the tax to

[20] *See, e.g., Fort Mojave Tribe v. San Bernardino County,* 543 F.2d 1253, 1255-1256 (9th Cir. 1976), *cert. denied* 430 U.S. 983 (1977); *Agua Caliente Band of Mission Indians v. County of Riverside,* 442 F.2d 1184, 1186-1187 (9th Cir. 1971), *cert. denied,* 405 U.S. 933 (1972), *rehearing denied* 405 U.S. 1033 (1972), *motion for leave to file second petition for rehearing denied,* 409 U.S. 901 (1972); *Kahn v. Arizona State Tax Commission,* 16 Ariz.App. 17, 18-21, 490 P.2d 846, 847-850 (1971), *appeal dismissed* (want of substantial federal question) 411 U.S. 941 (1973) (Brennan, Douglas, JJ., dissenting with opinion, 411 U.S. at 941-944); *Makah Indian Tribe v. Tax Commission,* 72 Wash.2d 613, 615-617, 434 P.2d 580 581-582 (1967), *appeal dismissed* (want of substantial federal question) 393 U.S. 8 (1968). In this regard, and with respect to the *Moe* decision, *see also* the discussion of the adverse economic consequences actually or potentially borne by Joseph Wheeler, the Indian cigarette merchant, in the Appellee/Cross-Appellants' Opening Brief, USSC Doc. Nos. 74-1656 and 75-50, October Term, 1975, p.23, n.26. It is unclear from either the District Court's opinion or this Court's opinion in *Moe* whether Mr. Wheeler was a federally licensed Indian trader. *See Confederated Salish and Kootenai Tribes v. Moe,* 392 F.Supp. 1297, 1311 (D. Mont. 1975).

[21] *See, e.g., In the Matter of the State Motor Fuel Tax Liability of A.G.E. Corp., supra; Department of Revenue v. Hane Construction Co., Inc., supra; G. M. Shupe, Inc. v. Bureau of Revenue,* 89 N.M. 265, 550 P.2d 277 (1976); *Chief Seattle Properties, Inc. v. Kitsap County,* 86 Wash.2d 7, 541 P.2d 699 (1976).

the United States,[22] the tax does not constitute an impermissible infringement upon or interference with the sovereign immunity from state taxation enjoyed by the United States.[23]

The effect of the foregoing decisions insofar as the proper resolution of the case *sub judice* is concerned is to demonstrate that the question of interference with tribal rights of self-government under *Williams* and/or infringement of reservation Indian immunities from state taxation (as distinguished from insulation from the costs of such taxation engendered by contract doctrines) under *McClanahan* are confusing and complicated. Neither Pinetop, WMAT nor the United States accord to the foregoing decisions of this Court or the principles espoused therein any more than the most abbreviated consideration. Instead, the decision in *Warren* is relied upon by Pinetop and WMAT (Brief for Petitioners, *passim*) and the United States (United States Amicus Curiae Brief at 9, 10, 19, 21-22 n.13) to such a depth that, in the words of the Brief for Petitioners, p. 25, the case is "... so strikingly similar to this one that it overshadows all other precedents." (Footnote omitted.) Accordingly, a somewhat detailed inquiry into the rationale underlying *Warren*, as evidenced by the legislative histories of the Indian trader's statutes (25 U.S.C. §§ 261, *et seq.*), the Hayden-Cartwright Act (4 U.S.C. § 104), the Buck Act

[22] This contractual "shifting" is to be carefully distinguished from situations where the state law *mandates* the collection of the tax from the customer or vendee of the business, in which latter event the tax becomes, for federal purposes, a vendee liability and impermissible vis à vis purchases by the United States or its instrumentalities. *See, e.g., Diamond National Corp. v. State Board of Equalization,* 425 U.S. 268 (1976), *citing First Agricultural National Bank of Berkshire County v. State Tax Commission,* 392 U.S. 339, 346-348 (1968). *Cf. Kern-Limerick, Inc. v. Scurlock,* 347 U.S. 110, 123-124 (Black, J., dissenting (with concurrence by Warren, C. J. and Douglas, J.)), 124-127, (Douglas, J., dissenting, (with concurrence by Warren, C.J., and Black, J.)) (1954).

[23] *See, e.g., Gurley v. Rhoden, supra; Alabama v. King & Boozer,* 314 U.S. 1 (1941); *James v. Dravo Contracting Co., supra; Alward v. Johnson,* 282 U.S. 509 (1931).

(4 U.S.C. §§ 105-110), as well as the precedent and opinions relied upon in the decision, is necessary. Such an examination, the Respondents would submit, will support the conclusion that not only do these state taxes fail to in any way infringe upon WMAT's right of self-government, it will reveal specific congressional authority supporting the levy even *if* infringement would have otherwise been found.

III
WARREN TRADING POST COMPANY V. ARIZONA STATE TAX COMMISSION IS NOT CONTROLLING

A. Introduction

This Court has held that the Arizona transaction privilege tax (Ariz. Rev. Stats. §§ 42-1301 *et. seq.*) cannot be imposed upon a federally licensed Indian trader engaged in the business of Indian trading with Indians on an Indian reservation. *Warren Trading Post Company v. Arizona State Tax Commission,* 380 U.S. 685 (1965). To permit the taxes, the opinion states, (380 U.S. at 691) would be to

> "... put financial burdens on appellant or the Indians with whom it deals in addition to those Congress or the tribes have prescribed, and ... thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commission."

This language articulates the concern in terms of prices and additional financial burdens rather than in terms of state taxes *qua* taxes. In this respect, the statement is consistent with the long-standing congressional design to protect and shield the Indians on reservations from the economic depredations they might otherwise actually or potentially suffer at

the hands of unscrupulous traders.[24] Such a concern to protect reservation Indians from unfair or unreasonable prices, however, is not synonymous with an objective to prohibit licensed Indian traders from seeking reimbursement for their costs plus a profit. Indeed, the Code of Federal Regulations suggests that just the opposite was intended by Congress. *See, e.g.,* 25 C.F.R. § 252.55 providing for price monitoring and control as well as recovery of the trader's costs plus a "... reasonable markup."

It is the Respondents' position, therefore, that the proper inquiry, insofar as the decision in *Warren* is concerned, is whether or not, in the context presented, Congress intended to either infer or imply a preemption of state use fuel and/or motor carrier taxes as applied to non-Indian contractors who deal with Indians pursuant to federally-approved contracts. The concern is two-fold, requiring first a resolution of the question of the scope of the federal scheme: is it, in reality, so all-pervasive that, like a giant magnet, it draws within its influence all matters, direct and indirect, which may be perceived to affect the federal objective in any way? The answer to this question is set forth in Argument I, *supra.* The remaining inquiry focuses on the Hayden-Cartwright Act (4 U.S.C. § 104) and the Buck Act (4 U.S.C. §§ 105-110).[25]

B. The legislative history of the Hayden-Cartwright Act and the Buck Act supports the levy of the taxes herein.

In connection with their theory that the Hayden-

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[24] *Warren, supra,* 380 U.S. at 689 n.4. *See, also,* F. Cohen "Handbook of Federal Indian Law" (U.S. Department of Interior 1945) at 348 n.2 detailing the various congressional enactments bearing upon this subject. *Cf. Rockbridge v. Lincoln,* 449 F.2d 567 (9th Cir. 1971) outlining some of the concerns.

[25] Pinetop and WMAT discuss the Buck Act in connection with an attempt to avoid the operation of the Hayden-Cartwright Act at pp. 56-60 nn. 34, 35, Brief for Petitioners. The United States as amicus curiae also discusses the Buck Act in connection with the Hayden-Cartwright Act, United States Amicus Curiae Brief, pp. 21-22 n.13.

Cartwright Act does not apply to Indian reservations, Pinetop and WMAT argue (Brief for Petitioners, p. 58 n.35) that the legislative history of the Buck Act, as well as footnote 18 in *Warren*, establish that no intent to extend the provisions of the former Act is discernable from the Committee Reports and floor debates relating to the legislation. The Petitioners' argument is that, since this Court stated in *Warren* that the Buck Act did not apply to Indian reservations, and since the 1940 amendment by the Buck Act of § 10 of the Hayden-Cartwright Act (now codified at 4 U.S.C. § 104) purportedly "... integrated into the Buck Act ..." said § 10, the conclusions set forth in footnote 18 of *Warren* require the result that § 10 of the Hayden-Cartwright Act (*i.e.*, 4 U.S.C. § 104) is similarly inapplicable to Indian reservations.[26]

To support this contention, Pinetop and WMAT cite by an "accord" prefatory signal this Court's decision in *McClanahan*, 411 U.S. at 176. Pinetop and WMAT then express interest in the purported fact that, in *McClanahan*, this Court

> "... cites 4 U.S.C. § *104* as being part of the Buck Act - an accurate characterization in light of the Hayden-Cartwright Act's amendment by and integration into the more comprehensive Buck Act." (Emphasis added).

In point of fact, however, the correct citation to the statute at which the codification of the Buck Act begins is 4 U.S.C. § *105* rather than 4 U.S.C. § 104.[27] An examination of the official reporter reveals that, contrary to the beliefs of Pinetop and WMAT, this Court held that

[26] *See* Brief for Petitioners, p. 58 n.35.

[27] *See* the Official United States Reports, Vol. 411, page 176 and *compare with* either of the two major commercial parallel reporter services, 93 S.Ct. at 1264 and 36 L.Ed.2d at 138.

> "... Congress' intent to maintain the tax exempt status of reservation Indians is especially clear in light of the Buck Act, 4 U.S.C. § *105 et seq., which provides comprehensive federal guidance for state taxation of those living within federal areas.*" (Emphasis added).

In their zeal to demonstrate that § 10 of the Hayden-Cartwright Act (4 U.S.C. § 104) does *not* apply to Indian reservations, Pinetop and WMAT have instead generated several compelling indications suggesting that it *does* so apply.

First, the Petitioners have shown that, whatever interpretation this Court has placed upon the Buck Act in either the *McClanahan* or *Warren*[28] decisions, the Hayden-Cartwright Act had a different legislative history. Any questioning of the contention, therefore, that the Buck Act *does* apply to Indian reservations would not affect the applicability of the Hayden-Cartwright Act. Stated otherwise, while this Court in *Warren* has stated for various reasons that, in its opinion (380 U.S. at 691 n.18), the Buck Act does not apply to Indian reservations, it has not opined upon the applicability of the Hayden-Cartwright Act. However, *cf. Sanders v. Oklahoma Tax Commission*, 197 Okla. 285, 169 P.2d 748 (1946), *cert. denied*, 329 U.S. 780 (1946) holding, *inter alia*, that § 10 of the Hayden-Cartwright Act, 4 U.S.C. § 104, applied within two federal areas (a flood control dam region and an aircraft plant) notwithstanding the fact that the fuel in question was not consumed upon public highways. *See* n. 20, *supra*.

Thus, by referencing the *McClanahan* case, Pinetop and WMAT have supplied the information which, under their theory, compels the conclusion that the use fuel and motor carrier taxes herein apply to Pinetop on the Fort Apache Reservation.

[28] *Warren* correctly cites the Buck Act as being codified at 4 U.S.C. §§ 105-110. *See* 380 U.S. at 691 n.18.

Second, and of somewhat greater significance, the Petitioners' underlying argument — apart from reliance upon *McClanahan* — that the Hayden-Cartwright Act does not apply on Indian reservations is at odds with the holding in 57 I.D. 129.[29] There, after a thorough and "... searching analysis of the problems presented, ..."[30] the Solicitor of the Interior Department held that while state taxes did not apply to sales of gasoline for direct use by the Menominee Tribe in the actual operation of the tribal lumber mill, the taxes *did* apply to sales of gasoline to employees of the mill and/or the general public, whether Indian or non-Indian. *See* 57 I.D. at 137-140.

In order to arrive at this conclusion, the opinion specifically considered the question of whether or not the phrase "United States military or other reservations" contained in § 10 of the Hayden-Cartwright Act evinced a congressional intent to apply the legislation to Indian reservations. In concluding that such, indeed, was the intent of Congress, the opinion noted that the legislative history demonstrated an intent to deal with Indian reservation roads under the Federal Aid Highway Act of 1936. The opinion noted, 57 I.D. at 139:

> "Moreover, when the amendment in question[31] was introduced, the agencies enumerated did not include licensed traders and filling stations.[32] The addition of these agencies by the conference committee[33] indicates an intent to broaden the application of the statute, and *the reference to "licensed traders" is particularly suggestive of Indian reservations.* These indications, while slight, are sufficient to give ground

[29] 57 I.D. 129 is cited in the brief of the United States (United States Amicus Curiae Brief, p. 21 n.13), but not in the Brief for the Petitioners.

[30] *See,* F. Cohen "Handbook of Federal Indian Law" (U.S. Department of Interior 1945) at 264.

[31] 49 Stat. 1521, § 10 of the Hayden-Cartwright Act.

[32] This is correct. *See* 80 Cong. Rec. 6913 (May 8, 1936).

[33] *See* House Conference Committee Report No. 2902, 74th Cong. 2d Sess. (June 1, 1936).

> for considering the broad language of the statute as including Indian reservations." (Emphasis added)

Accordingly, it is the Respondents' position herein, based upon the foregoing, that the Hayden-Cartwright Act was intended by Congress to apply to Indian reservations to permit the application of the taxes here in question to the fuels used by Pinetop (as distinguished from the FATCO sawmill near Whiteriver, Arizona)[34] in connection with its log-hauling operations.[35]

[34] *See* Pet. App., 4a.

[35] Throughout their brief, the Petitioners repeatedly assert that these taxes are impermissible because the tribal and BIA roads are purportedly neither built, maintained nor repaired by the State. The suggestion is thus created that Pinetop should not be subjected to the taxes because they are not expended to build, repair or maintain the BIA and tribal roads it uses and it is thus inappropriate to charge them for assertedly non-existent benefits. However, the General Manager of Pinetop, Mr. Carpenter, stated that, while he was not personally aware of any instance where state equipment or personnel had been so used, it was possible that such may have occurred. *See* Carpenter Depo., pp. 72-73. Furthermore, Pinetop concedes that it uses state highways that traverse the Fort Apache Indian Reservation and that as to that portion of its travels, it has paid the subject taxes without protest. Brief for Petitioners, p. 13. *See also* Carpenter Depo., area map exhibit.

Neither the allegation nor the fact, if established, that one subjected to state taxes does not share equally in benefits or services from the state is sufficient grounds for invalidating a tax upon him. *Wagoner v. Evans,* 170 U.S. 588, 592 (1898); *Thomas v. Gay,* 169 U.S. 264, 278 (1898); *Kelly v. Pittsburg,* 104 U.S. 78, 81-82 (1881). This "benefits/burdens" issue is a matter of state law which has been conclusively resolved against Pinetop's contention. *See Winkler Trucking Co. v. McAhren,* 60 Ariz. 225, 133 P.2d 757 (1943) holding, with respect to motor carrier taxes, that the tax applies to the gross receipts even if they include income attributable to travel occurring *off* of public highways. It is the State's position, of course, that the roads in question herein are public highways within the meaning of Ariz. Rev. Stat. § 40-601 (A) (11). *See* Pet. App., pp. 62a-63a; *see also* 25 C.F.R. § 162.8 (a) mandating "... free public use ..." of all roads eligible for construction and maintenance with federal funds under 25 C.F.R. Part 162 (Roads of the Bureau of Indian Affairs); *Sanders v. Oklahoma Tax Commission,* 197 Okla. 285, 169 P.2d 748 (1945), *cert. denied,* 329 U.S. 780 (1946).

Third, the Petitioners' reliance, albeit misplaced, upon *McClanahan* as bearing upon the relationship between the Buck Act and the Hayden-Cartwright Act necessitates a somewhat closer examination of that holding insofar as its analysis of the Buck Act is concerned. As previously seen, the opinion specifically states that the Buck Act, 4 U.S.C. §§ 105 *et seq.*, constitutes a clear manifestation of Congress' intent to shield reservation Indians from the imposition of the direct legal incidence of state taxes[36] and that the Act

> "... provides comprehensive federal guidance for state taxation of those living within federal areas." 411 U.S. at 176.

Through the enactment of the Buck Act, 54 Stat. 1059 (1940), specific congressional authority was granted to the states to impose and collect various taxes within "federal areas" as that term is defined in 4 U.S.C. § 110(e). In this regard, although authority to impose and collect state sales, use and income taxes exists by virtue of 4 U.S.C. §§ 105 and 106, 4 U.S.C. § 109 specifically exempts "... any Indian not otherwise taxed." An examination of the legislative history of the Buck Act will reveal substantial evidence of a congressional intent to provide for a complete allocation of taxing authority with respect to "federal areas" in an attempt to dispel the confusion and ambiguity then existing with respect to the taxation of persons and/or transactions occurring therein.

In 1939, Representative Frank H. Buck of California, first introduced legislation to provide for the application of state sales and use taxes in those areas where the federal government "... may have jurisdiction." *See* H. R. 6687, 76th Cong., 1st Sess., 84 Cong.Rec. 6737 (1939). Although this legislation passed in the House of Representatives (*see* 84 Cong.Rec. 10093), it did not survive through the Senate. The following year, the Senate Finance Committee made

[36] The issue in *McClanahan* — unlike that in *Warren* — was whether a Navajo Indian on her own reservation was subject to the direct levy of the Arizona income tax. *See McClanahan*, 411 U.S. at 166.

various amendments to the bill to add state income taxes, to exempt sales by instrumentalities of the United States, and to exempt the imposition of state taxes, whether sales, use, or income, upon reservation Indians. *See* S.Rep.No. 1625, 76th Cong., 3rd Sess. (1940); Hearing on H.R. 6687 Before a Subcommittee of the Senate Committee on Finance, 76 Cong., 3rd Sess., (April 23, 1940) (hereinafter "Hearing"). After this hearing, H.R. 6687 was passed by both houses of Congress (October 9, 1940: 54 Stat. 1059) and, following its re-enactment and codification in 1947, became the present 4 U.S.C. §§ 105-110.

A report which had been prepared by Congressman Buck for the April 23, 1940 hearing articulated the purpose of the Act, Hearing, *supra*, pp. 3-4:

> "Recent decisions of the Supreme Court of the United States in the cases of ... [cases omitted], [37] while opening the way for the application of certain nondiscriminatory State taxes on Federal areas, except insofar as those taxes may constitute a burden upon the United States, have not clearly indicated the exact extent of state authority in this respect.
>
> "Divergent views being expressed by taxpayers and taxing authorities makes [*sic*] it evident that prolonged and expensive litigation will be required to clarify the law on the subject if the limits of State authority with respect to the various types of Federal areas are to be established through judicial decisions. This litigation and the period of uncertainity which will necessary [*sic*] exist pending final decisions by the United States Supreme Court may, however, be avoided through Congressional action, a precedent for which is to be

[37] The cases to which Congressman Buck referred were *James v. Dravo Contracting Company, supra, Silas Mason Company v. Tax Commission*, 302 U.S. 186 (1937), and *Atkinson v. State Tax Commission*, 303 U.S. 20 (1938).

found in an Act of Congress approved June 16, 1936, amending Section 10 of the Hayden-Cartwright Act (49 Stat. 1521; 23 U.S.C.A., § 55a) relating to State motor vehicle fuel taxes.

. . .

"A minor problem presented with respect to the application of State sales taxes on Federal areas involves the responsibility for such taxes of post exchanges, ship-service stores, commissaries, *licensed traders*, and other similar agencies operating on Federal areas." (Emphasis added).

The question of whether or not the grant of taxing authority under consideration should apply to Indian reservations was thus specifically considered. In fact, Representative Buck stated (Hearing, p. 2) that, in his personal experience, a problem existed with respect to taxes on sales

"... at commissaries, *licensed traders*, [*sic*] and other similar agencies. We had some bad situations with regard to these *licensed traders*. There are *licensed traders* on certain reservations, for instance, at Palm Springs, Calif., you [*sic*] have your reservation line right down the street, and on one side of the street you have merchants who are paying sales taxes, and on the other side you have *licensed traders* who are not paying any sales tax on identically the same types of goods." (Emphasis added)

With regard to Congressman Buck's statement, *see Agua Caliente Band of Mission Indians v. County of Riverside*, 306 F.Supp. 279, 281 (C.D.Cal. 1969) (subsequent case history omitted: *see* n.20, *supra*), establishing that the Agua Caliente Indian Reservation exists on a checkerboard pattern in the area of Palm Springs, California. This Court may take judicial notice of the geographic fact that the only federal reservation in the vicinity of Palm Springs, California is the Agua Caliente Indian Reservation.

At the April 23, 1940 hearing, however, the United States Department of the Interior took a position that Indian reservations should be excluded from the reach of the Buck Act. *See* letter from E. K. Burlew, Acting Secretary of the Interior, March 13, 1940, Hearing, *supra*, pp. 39-40. In that letter, the Interior Department argued in favor of the so-called "LaFollette Amendment" which provided that "... this act [*i.e.*, the Buck Act] shall not affect existing law relating to taxation on Indian reservations."

The ultimate form of 4 U.S.C. § 109, however, followed the position urged by Representative Dempsey of New Mexico. *See*, Hearing, *supra*, pp. 18-20. His position was that the Buck Act should exempt *Indians*, but not Indian *reservations*, his view being that:

"... [W]e have no desire to tax the Indians. They are exempt from taxation in our state, but we do not believe that because a man establishes a store on Indian lands competing with a store outside, the store inside should be exempt from all taxation, and the store outside should pay."

As the foregoing legislative history demonstrates, the concern of the legislators was not over whether or not the Buck Act should apply to Indian reservations, but rather whether the Buck Act should authorize the levy of the direct legal incidence of state sales, use or income taxes upon reservation Indians. Indeed, the rejection of the LaFollette Amendment in favor of the position advocated by Representative Dempsey is conclusive proof that Congress considered Indian reservations to be "federal areas" within the purview of what eventually became 4 U.S.C. § 110(e). It also demonstrates that Congress continued to support an objective of shielding reservation Indians from the direct legal incidence of state taxes, but did not intend to shield *non*-Indians — including licensed traders — from such taxation if they were located within a particular type of federal area, an Indian reservation.

Returning, therefore, to the decision in *McClanahan*, the Court's ruling that the Buck Act provided comprehensive federal guidance for state taxation of those living within federal areas is clearly correct with respect to the particular federal area within which Rosalind McClanahan lived, the Navajo Indian Reservation. However, if an Indian reservation is a "federal area" for purposes of 4 U.S.C. § 109, should it not also be a "federal area" for purposes of 4 U.S.C. §§ 105 and 106? Unless the answer to this question is "yes," at this juncture something of a disparity may appear to exist between the conclusion in footnote 18 in *Warren* and the Court's subsequent ruling in *McClanahan*. In this regard, it is noteworthy that a total of eight briefs and/or memoranda filed by the parties and various amici curiae in the *McClanahan* case urged the uniform position that the Buck Act was either specifically, implicitly or impliedly applicable to Indian reservations.[38]

It is the Respondents' position, based upon the foregoing, that the conclusion reached in 58 I.D. 562, 563 (*see Warren*, 380 U.S. at 691 n.18) is inconsistent with the legislative history of both the Hayden-Cartwright Act and the Buck Act. Even if Pinetop were a licensed trader (which notion even the United States Amicus Curiae Brief rejects, p. 11, n.9), it should not be able to claim sanctuary upon the theory that

[38] These briefs were filed in the *McClanahan* case, USSC Docket No. 71-834, October Term, 1971: (1) Appellant's Supplemental Brief in Opposition to Appellee's Motion to Dismiss or Affirm; (2) Brief for Appellant; (3) Reply Brief for Appellant; (4) Memorandum for the United States as Amicus Curiae; (5) Brief for the United States as Amicus Curiae; (6) Brief of the Navajo Tribe of Indians, as Amicus Curiae, in Support of Jurisdictional Statement; (7) Brief of Montana Inter-Tribal Policy Board as Amicus Curiae; (8) Brief for Amicus Curiae, National Congress of American Indians in Support of Appellant. In this regard, compare the similar although not identical position adopted by the United States as amicus curiae in *Kahn v. Arizona State Tax Commission*, 16 Ariz. App. 17, 490 P.2d 846 (1971), *appeal dismissed* (want of substantial federal question), 411 U.S. 941 (1973) (Brennan, Douglas, J.J., dissenting with opinion, 411 U.S. at 941-944), Memorandum for United States as Amicus Curiae, USSC Doc. No. 71-1263, October Term, 1972, p. 5.

the Fort Apache Indian Reservation is not a "federal area." As this Court observed in *McClanahan* and as the parties and amici curiae therein (save the State of Arizona) argued, the Buck Act *was* intended by Congress to apply to Indian reservations.[39] The Respondents agree with the proposition that there is no intent expressed in the Buck Act to permit the direct application of State taxes (*i.e.*, the visitation of the legal incidence of said taxes) to reservation Indians. There is, however, a clear expression of intent by the Congress to extend the Buck Act to "licensed traders" on a particular species of federal area, *viz.*, Indian reservations.

An interpretation such as this will bring consistency to the decisions in the *Warren* and *McClanahan* cases and will be completely harmonious with this Court's decision in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976). There, this Court held that where the legal incidence of a state tax fell upon an Indian, it was impermissible. However, where the legal obligation for the tax fell upon a *non*-Indian, it was upheld notwithstanding the facts that (1) the vendor was an Indian, (2) the vendor was an Indian seemingly clearly engaged in the business of Indian trading on an Indian reservation (*see* 25 U.S.C. §§ 261, 264; 25 C.F.R. Part 251), and (3) the vendor Indian demonstrated or alleged that adverse economic ramifications would unavoidably be placed upon him by mandate of state law (*i.e.*, the Montana "pre-collection" requirement: *see Moe*, 425 U.S. at 482) as a result of the imposition of the taxes upon his non-Indian customers.[40]

Accordingly, for the foregoing reasons it is the Respondents' position that both the Hayden-Cartwright Act (with respect to the Arizona use fuel tax, Ariz. Rev. Stat. § 28-1552) and the Buck Act (with respect to the Arizona motor

[39] A similar but more extensive discussion of this result is contained in the Brief of the Appellee in *Central Machinery Co. v. State of Arizona*, USSC Doc. No. 78-1604, October Term, 1979 (argued in tandem with the case herein).

[40] *See*, n.20, *supra*.

carrier tax, Ariz. Rev. Stat. § 40-641) are properly applied to the non-Indian, independent log-hauling contractor, Pinetop Logging Co. Rather than being preempted under the rationale of *Warren,* these state taxes neither invade the federal sphere of federal tribal forestry management nor do they infringe upon any right of self-government enjoyed by the White Mountain Apache Tribe.

CONCLUSION

As is true with respect to most questions involving the perplexing area of Indian law, answers are not always easily discernible. However, in the present case, the Respondents would respectfully submit that a thorough, candid and objective examination of the issues presented must lead to the conclusion that the Hayden-Cartwright Act and the Buck Act are the precise species of governing acts of Congress referenced in *Williams v. Lee, supra.* The decision of the Arizona Court of Appeals was correct when rendered and remains correct now. Accordingly, the decision should be affirmed.

Respectfully submitted,

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APPENDIX

4 U.S.C. § 104. Tax on motor fuel sold on military or other reservation[;] reports to state taxing authority.

(a) All taxes levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State, Territory, or the District of Columbia, within whose borders the reservation affected may be located.

(b) The officer in charge of such reservation shall, on or before the fifteenth day of each month, submit a written statement to the proper taxing authorities of the State, Territory, or the District of Columbia within whose borders the reservation is located, showing the amount of such motor fuel with respect to which taxes are payable under subsection (a) for the preceding month.

(c) As used in this section, the term "Territory" shall include Guam.

4 U.S.C. § 105. State, and so forth, taxation affecting federal areas; sales or use tax

(a) No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal

area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to sales or purchases made, receipts from sales received, or storage or use occurring, after December 31, 1940.

4 U.S.C. § 106. Same; income tax

(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940.

4 U.S.C. § 109. Same; exception of Indians

Nothing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed.

4 U.S.C. § 110. Same; definitions

As used in sections 105-109 of this title—

. . .

(e) The term "Federal area" means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any State, shall be deemed to be a Federal area located within such State.

Supreme Court of the United States

October Term, 1979

No. 78-1177

WHITE MOUNTAIN APACHE TRIBE, et al.,
Petitioners,
v.
ROBERT M. BRACKER, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS, DIV. ONE

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

ARGUMENT

I. PREEMPTION BY FEDERAL REGULATION OF INDIAN TIMBER

The State of Arizona continues to hide its candle under a bushel basket. We search the State's brief in vain to find any specific and substantial interests of the State of Arizona which might weigh in favor of the State's claim to collect these taxes. Nor does the State discuss the specific objectives of federal timber regulation which are fully documented in the Brief for Petitioners, pp. 27-36.

The State notes that Congress has instructed the Secretary of the Interior to deduct from proceeds of tribal forestry programs funds to reimburse the United States for its substantial services provided to such programs. (Brief for Respondents, p. 6 n. 4 and p. 8) It then seems to argue that since the Congress authorized the United States to charge the Tribe for substantial services rendered, it must

also be consistent with the legislative objectives for the State to charge the Tribe for no services rendered. The logic of this argument is elusive. Rather, the opposite conclusion should be drawn from the premise.

The State endorses the argument advanced by the court below that the *de facto* economic burden upon the Tribe from these taxes is without legal significance. (Brief for Respondents, pp. 9 and 16-17.) Respondents rely on cases arising under the constitutional rule that states are permitted to levy nondiscriminatory taxes against persons who deal with the United States even though the economic burden of those taxes passes to the United States. Those cases do not offer an appropriate analogy to the preemption and infringement problems before the Court in this case.

The constitutional rule that mere economic burden upon the United States from nondiscriminatory state taxation of federal contractors will not invalidate those state taxes is, by definition, a rule of constitutional law to govern only when Congress has not by legislation prescribed a different rule. *United States v. County of Fresno*, 429 U.S. 452, 460 (1977); *Alabama v. King & Boozer*, 314 U.S. 1, 8 (1941). By contrast, the problem before the Court in this case is precisely to determine the nature and effect of legislation and legislative policies.

Congressional policies which are largely economic are at the heart of the preemption problem before the Court. To refuse consideration of the true economic consequences of state taxes in resolving a legislative preemption question dealing with economic policies is to refuse to give weight to the very factors which are pertinent to the legislative purposes.

The attempted analogy to federal contractors also overlooks a crucial specific difference in the two situations. That is the quasi-territoriality of federal Indian law and policy. The fact that these activities occur entirely within the Indian reservation is highly significant for purposes of Indian law because the reservation boundary is in many

respects a territorial boundary — marking the primary locus of the effectuation of federal Indian policies in general and of tribal self-government in particular. To the extent this quasi-territoriality is a feature of federal Indian law, situs of the activity on the reservation counts for a quantum reduction in the substantiality of the State's basis for taxing authority. There is no analogous principle impinging upon general state taxation of federal contractors, and thus the states enjoy a presumptively expansive taxing authority over persons notwithstanding their federal dealings. But for purposes of federal Indian law and policy, the reservation boundary does have meaning. State taxation of federal contractors is particularly not analogous to state taxation affecting federal Indian programs because of the unique significance of reservation situs in Indian cases.

The state also argues that the legal incidence of these taxes upon a non-Indian corporation is controlling and that further inquiry into the ill effects of such taxation upon congressional regulatory schemes is not permitted. (Brief for Respondents, pp. 10-11 & n. 11.) The State argues that the fact that the burden of the taxes is "shifted" from Pinetop to the Tribe "as a normal incident of contractual negotiation" rather than as a requirement of state law immunizes it from further scrutiny for preemption purposes. If that argument is good, then *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685 (1965), must be overruled *in toto* since in that case the legal incidence of the tax fell on the non-Indian retailer and was not required by state law to be passed on to the Indian buyer.

The significant fact with respect to the true economic burdens of the taxes is that the Tribe as a matter of economics has no choice but to agree to pay the taxes in the future. As a contractor with the Tribe, Pinetop sells services to the Tribe on a cost-plus-profit basis. No logger would enter into such contracts with the Tribe except on the assumption that the agreed-upon compensation would

be adequate to meet foreseeable expenses and to provide a sufficient entrepreneurial return. These State taxes, if upheld, become just one more identifiable cost which must be recouped by the loggers from the Tribe.

The State indulges in a mathematical shell game at pages 10-11 respecting the economic impact of these taxes on this Tribe. The Brief for Petitioners, pp. 15-16, shows that the actual taxes paid under protest by Pinetop Logging Company do not accurately reflect the total economic impact upon the Tribe of the collection of these taxes from its loggers. Only one of six such loggers is a party to this lawsuit. Similar refund actions have been brought by other loggers but have been stayed pending the outcome of this suit, which the parties have treated as a test case. (*Id.* at 3.)

Yet the State implies, in bold disregard of those facts, that the amount of taxes paid under protest by Pinetop Logging Company alone ought to be considered the full measure of the economic impact upon the Tribe of these taxes on its loggers. (Brief for Respondent, pp. 10-11 and n. 16.)

The Petitioners believe the true total effect of these taxes falls between $20,000 and $50,000 a year. The present discounted value of such exactions ranges from hundreds of thousands of dollars to more than a half-million dollars.

One should not make too much of the State's failure to acknowledge the full impact of these taxes upon the Tribe. Even at $9,000 annually the impact is significant. That amount alone would be enough to employ a member of the Tribe and thus to allow an entire family to remain on the reservation rather than abandon their home, relatives, and traditional culture for the sake of decent employment. Hopefully, the State of Arizona does not really mean to suggest to this Court that the avoidance of that misfortune is a "trivial and insubstantial" accomplishment of the purposes of Indian timber regulation. (*Cf.* Brief for Respondents, p. 9.)

II. INFRINGEMENT OF TRIBAL SELF-GOVERNMENT

Though the State asserts the Tribe's infringement claim is grounded on "largely illusory concerns" (Brief for Respondents, pp. 13-14), the State declines to rebut or even mention any of the specific claims of infringement stated at pp. 52-55 of the Brief for Petitioners.

The State suggests that the infringement question is "far more subtle, complex and difficult" than the Petitioners allow and that the questions are "confusing and complicated." But the State does not offer a "more subtle" analysis to better accommodate the difficulty of the problem. Instead, it offers a far blunter resolution: that the infringement doctrine should never concern itself with the reality of harm to tribal government as long as the State does that harm by laws whose legal incidence falls immediately on non-Indians. (Brief for Respondents, pp. 16-17.) Arizona's proposed resolution for these "complex and difficult" disputes is that Arizona should always win, provided only that it writes its laws to hurt the Indians by hitting the non-Indians.

Though the State dislikes the word "overrule", this is in reality a request that *Williams v. Lee*, 358 U.S. 217 (1959), and *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 179 (1973), be overruled to the extent they hold states are not permitted to infringe on tribal self-government even under the guise of regulating the non-Indian aspects of joint Indian/non-Indian activities on the reservation.

Weightier reasons than simply Arizona's naked request should be required for partial overrulings of *Williams* and *McClanahan*.

III. THE BUCK ACT

The principal burden of the Respondents' Brief is that, even though the Petitioners' preemption and infringement claims may otherwise be valid, the Arizona use fuel tax and motor carrier license tax are expressly authorized by the

Hayden-Cartwright Act, 4 U.S.C. § 104, and the Buck Act,[1] 4 U.S.C. §§ 105 *et seq.*, respectively. The State of Arizona references its brief in the tandem case of *Central Machinery Co. v. State of Arizona*, No. 78-1604, where it argues the same point with respect to the Buck Act.

The State's submission with respect to the Buck Act admittedly would require an overruling of the construction given that statute in *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685, 691 n. 18 (1965) and repeated in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973).

The Appellants' Reply Brief in No. 78-1604 establishes from its legislative history that the Buck Act was intended to leave state taxation on Indian reservations as it was before the Act, neither taking from the Indians any immunity or measure of tribal self-government nor granting any new immunities to non-Indian commerce not affecting the rights of Indians. Rather than burden the Court with repetition, the Petitioners adopt the discussion of the Buck Act presented in the Reply Brief in No. 78-1604 (including the submission that the State of Arizona is collaterally estopped from relitigating this point of law in this Court for a third time in fifteen years).

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[1] By the terms of the Buck Act, the Arizona use fuel tax could not come within the Buck Act's general authorization of "any sales or use tax" (4 U.S.C. § 105(a)) since that phrase is defined in 4 U.S.C. § 110(b) so as to exclude motor fuel taxes which are addressed by the Hayden-Cartwright Act. The Senate Report on the Buck Act confirms that "any State tax which is imposed on sales of gasoline and other motor-vehicle fuels will continue to be imposed on such sales in Federal areas under the provisions of section 7 of the committee amendment [the amended Hayden-Cartwright Act], rather than under the provisions of section 1 of the committee amendment [4 U.S.C. § 105]."
S. Rep. No. 1625, 76th Cong. 3d Sess., 5 (1940) (cited hereinafter as S. Rep. No. 1625).

One point merits elaboration beyond what is said in the Reply Brief in No. 78-1604. The Buck Act speaks solely to the problems created by the exclusions of state law which derive *merely* from situs of the taxed event on a federal area. Such exclusion occurs on exclusive federal enclaves. The result as evidenced in the hearings[2] and the Senate committee report was to create privileged exemptions from state taxes which were unrelated to any federal purpose, pointlessly destructive of the state's revenue-raising ability, and whimsically allocated among the public.

The Buck Act was meant to end that problem, and that problem alone, with respect to sales, use, and income taxes. The Senate report made this clear when it said:

> Section 1 (a) of the committee amendment removes the exemption from sales or use taxes levied by a State, or any duly constituted taxing authority in a State, where the exemption is based *solely* on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area. *At the present time exemption from such taxes is claimed on the ground that the Federal Government has exclusive jurisdiction over such areas.*
>
> . . .
>
> Section 2 (a) of the committee amendment removes the exemption from income taxes levied by a State, or any duly constituted taxing authority in a State, where the exemption is based *solely* on the ground that the taxpayer resides within a Federal area or receives his income from transactions occurring or services performed in such area. S. Rep. No. 1625, 2, 3 (emphasis supplied).

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[2] Hearing on H.R. 6687 before a Subcommittee of the Senate Committee on Finance, 76th Cong., 3d Sess. (1940) (hereinafter cited as "Hearings").

The immunity of Indians or non-Indians from state taxes on Indian reservations does not arise *solely* from the situs on an Indian reservation. Indian reservations are not areas in which the Federal Government has exclusive jurisdiction. *Draper v. United States,* 164 U.S. 240 (1896); *Utah & N. Ry. Co. v. Fisher,* 116 U.S. 28 (1885). Rather, the immunity, when it applies, of Indians or non-Indians from state taxes on Indian reservations arises from independent federal sources. Those grounds are specific federal statutes, comprehensive and preemptive legislative schemes, executive regulations, and the "judicially made Indian law"[3] which fills in the interstices of the treaties, statutes, and executive pronouncements. To be sure, locus on an Indian reservation is usually an important or even essential element of the claim to immunity from state taxation based on federal Indian law principles. *See Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973). But the immunity is not "based solely on the ground" of the situs of the taxed event; nor does it flow from the extraterritoriality jurisprudence of exclusive federal enclaves. Rather, it flows from the conjunction of locus on an Indian reservation *and* other substantive federal laws and policies mandating the immunity.

The Senate report made it perfectly clear that the Buck Act does not repeal other substantive federal laws and policies mandating immunities from state taxes when it said:

> The section will not affect any right to claim any exemption from such taxes on any ground other than that the Federal Government has exclusive jurisdiction over the area where the transaction occurred. S. Rep. No. 1625, 2.

This language is sufficient to establish that Congress intended to affect no substantive federal rules except the sometimes rule that *mere* situs in a federal area may exclude state jurisdiction to tax. But, as is shown in the Reply Brief in No. 78-1604, Congress went further in 4 U.S.C.

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[3] *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 98 S. Ct. 1011, 1019 (1978)

§ 109 to specify that among the other bodies of federal law unaffected by the Buck Act was the law of the immunity of "Indians not otherwise taxed." But even that cautionary drafting was unnecessary since the initial thrust of the Act as expressed in the Senate Report did not purport to reach any other body of federal law immunities.

That is precisely the point of this Court's alternative holding in *Warren Trading Post Co.* that, even if the Buck Act generally includes Indian reservations within its definition of "federal areas", the Buck Act would not override the specific tax immunity otherwise inferable from the trader regulations. 380 U.S. at 691 n. 18. By the same logic, the Buck Act could not override the Petitioners' immunity from the Arizona motor carrier license tax independently mandated by preemptive federal regulation of Indian timber or by the infringement doctrine.

In summary, though the language of the Buck Act may have been drafted with less than perfect precision, the intended meaning of the language is laid bare in the Senate report. The Act removes only one weight from the scale — mere situs on a "federal area". Where the tax immunity claim has nothing remaining to weigh in its favor, the scale tips against the claim. Where the claim is supported by other sources of federal law as well, those other principles of federal law continue to control.

IV. THE HAYDEN-CARTWRIGHT ACT

The State's principal defense of its use fuel tax is the Hayden-Cartwright Act (Brief for Respondents, pp. 19-23), which has never been construed by this Court.

The Brief for Petitioners remarks by footnote that the Hayden-Cartwright Act's seemingly general consent to State motor fuel taxes on "military or other reservations" might not apply at all to Indian reservations. The State responds to that remark. (Brief for Respondents, pp. 19-23.) However, the point presented in detail by the Petitioners, and the only point which must be reached in this case, is whether the Hayden-Cartwright Act permits state motor

fuel taxation on tribal (not state) roads on the reservation when used by the Tribe itself, through its agents, on its own business. The State's brief declines to respond to that argument in any significant way. Thus, it may be assumed *arguendo* for purposes of this case that Indian reservations are not excluded *per se* from the Act's consent to state taxation.[4] The crucial question then is the one the State does not discuss.

A. The General Objective of the Act was Only to Remove the Situs Barrier to State Motor Fuel Taxation.

The entire relevant legislative history of Section 10 of the Hayden-Cartwright Act is presented in the Brief for Petitioners, pp. 56-60.[5] It is sparse compared to that of the Buck Act. However, some secondary evidence of the intent of the earlier Act can be found in the legislative history of the nearly contemporaneous Buck Act. The Hayden-Cartwright Act was frequently referred to as the precedent for removal of the purely territorial barrier to state taxation which flows from exclusive federal jurisdiction over an area. S. Rep. No. 1625, 2, 4, 5; Hearings, 4, 7, 10, 20, 21, 22.

Congressman Buck himself viewed his bill as "only an extension of the principle involved in that act [the Hayden-Cartwright Act]." Hearings, 4.

Though this evidence is hardly conclusive, it does tend to show that the Hayden-Cartwright Act was considered to be in the same vein as the Buck Act, which, as has been shown, did not upset independent federal immunities from state taxation but rather removed the defense to state taxation flowing solely from the situs of the transaction on a federal reservation. If the Hayden-Cartwright Act is thus read *in pari materia* with the Buck Act, then it should be presumed that it was not intended to repeal the otherwise preemptive force of Indian timber regulation.

[4] Pinetop has elected to pay Arizona taxes allocable to its fuel use on state roads. (App. 11.) The Petitioners do not choose to litigate the taxability of their use of state roads, and that question has never been at issue in this case.

[5] We have also examined Senator Carl Hayden's papers collected at the Hayden Library at Arizona State University. Though more than a dozen files deal directly or indirectly with the Hayden-Cartwright Act, we find no reference to Indian reservations in connection with § 10 of the Act.

However, it does strongly appear that, unlike the Buck Act, the Hayden-Cartwright Act evidences one substantive policy: the fair allocation of *state* road use tax burdens to all private users of those *state* roads. (*Cf.* Brief for Petitioners, pp. 58-59.)

That specific federal substantive policy might fairly be taken to override other conflicting policy-based federal immunities from states taxes (such as the *per se* immunities of Indians from all state taxation on the reservation). By definition, that substantive objective cannot clash with other federal immunities against taxation of use of tribal roads rather than state roads. At least with respect to fuel used on tribal roads there is no conflict between the preemptive effect of Indian timber regulation and the apparent purpose of the Hayden-Cartwright Act to prevent tax-free use of state highways. The State has made no attempt to show how the apparent objective of the Hayden-Cartwright Act to correlate benefits and burdens of state road use would be achieved by allowing states to derive windfall revenues from the use of tribal roads by tribal agents.

B. The Act Literally Does Not Sanction Taxation of Pinetop's Fuel Consumption Because Pinetop's Fuel Is Not "Sold By or Through" an Agency Located on the Reservation.

The simple purpose of the Act to eliminate the defense of situs of *sale* of the fuel on a federal reservation is reflected in the literal language of the Act, which states:

> All taxes levied by any State . . . upon, with respect to, or measured by, sales, purchases, storage or use of gasoline or other motor vehicle fuels may be levied in the same manner and to the same extent, with respect to such fuel *when sold by or through* post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, *and other similar agencies, located on United States military or other reservations*. . . . (Emphasis supplied.)

Furthermore, subsection (b) of the statute requires "[t]he officer in charge of such reservation" to submit a monthly statement to the state tax authorities "showing the amount of such motor fuel with respect to which taxes are payable under subsection (a) for the preceding month." This obligation can only be carried out with respect to fuel sold on the federal reservation.

In this case, the motor fuel the use of which Arizona seeks to tax is not "sold by or through . . . agencies located on United States military or other reservations." Rather, it is purchased in interstate commerce and trucked to the reservation for storage and use. This case does not fall within the literal scope of the Act's consent to taxation. That

should be the end of the inquiry.[6]

C. The Administrative Interpretation Relied Upon by the State Supports the Tribe and Pinetop Rather Than the State of Arizona

The State's principal discussion of the Hayden-Cartwright Act is its endorsement of the analysis of the Act set out in an opinion of the Solicitor of the Department of the Interior, 57 Interior Dec. 129 (1940).

That opinion concluded that the Act's reference to "United States military or other reservations" included Indian reservations, though the indications favoring the conclusion were "slight". 57 Interior Dec. at 139. Thus, sales of motor fuel on the reservation to private persons, Indian or non-Indian, were held taxable by the state.

The Solicitor's opinion does not discuss the possible application of the Act to taxation of motor fuel used on tribal roads rather than state roads. Therefore, the opinion does not undercut at all Petitioners' contention that the Act cannot be construed to validate collection of the Arizona use fuel tax from Pinetop Logging Company.

The Interior Solicitor's opinion states two other conclusions fatal to the State's position in this case. The first is that the Hayden-Cartwright Act does not validate state taxation of motor fuel used on Indian reservations but not "sold by or through" reservation agencies:

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[6] The State relies upon *Sanders v. Oklahoma Tax Commission*, 197 Okla. 285, 169 P.2d 748 (1946) as stating that the Hayden-Cartwright Act authorizes state motor fuel taxation of use of fuel on federal enclaves even though not purchased on the enclave. This statement was dictum since the fuel in question was otherwise purchased within the state and apparently would have been taxable at that point of sale. Furthermore, *Sanders* did not involve Indian reservations or any independent basis of federal immunity from state taxation, such as preemption from comprehensive timber regulation.

Better reasoned authority counter to *Sanders* is *State v. Yellowstone Park Co.*, 57 Wyo. 502, 121 P.2d 170, 171 (1972) ("the term 'sales' or 'when sold' are terms too plain to be construed away by a court").

(3) The Act of Congress of June 16, 1936, above quoted, does not change this conclusion since, in the first place, it applies only to gasoline *sold* through commissaries and like agencies on the reservation. It does not appear that the gasoline purchased from wholesalers and dealers for the operations of the mills is sold to the mills through the commissary or any like agency on the Menominee Reservation. 57 Interior Dec. at 138.

Furthermore, the Interior Solicitor's opinion expressly holds that the Hayden-Cartwright Act does not authorize state taxation of gasoline purchased and used in the Menominee tribal timber enterprise.

The opinion notes "several holdings by the Department that State gasoline taxes need not be paid in connection with purchases of gasoline for tribal enterprises (letter to Superintendent of the Great Lakes Agency approved by the Department June 21, 1938; departmental telegram to the Navajo Agency of August 1, 1938; memorandum of the Commissioner of Indian Affairs from the Solicitor, of December 3, 1938 and June 21, 1939)." 57 Interior Dec. at 138.

Thus, the Solicitor's opinion would expressly exempt from the Hayden-Cartwright Act "gasoline for tribal enterprises." In this case also the motor fuel is used directly in the business of the tribal timber enterprise by the Tribe's own agents.

In summary, there are at least three distinct reasons why the Hayden-Cartwright Act does not validate the state fuel use taxes at issue in this case. The first reason is that the fuel in question was not "sold by or through . . . agencies located on United States military or other reservations." The second reason is that the legislative history shows the Act to have been intended at most to authorize state taxation of motor fuel used in connection with state roads. The third reason is that, consistent with the administrative interpretation endorsed by the Respondents themselves, motor fuel used directly in connection with tribal enterprises is implicitly excluded from the scope of the Hayden-Cartwright Act's consent to state taxation.

D. In the Absence of Clear Legislative Intent, Principles of Construction Preclude the Destruction of Indian Tax Immunities By Inference

The foregoing discussion of the literal terms of the Act and of its legislative purposes ought to be sufficient without recourse to the canons of construction to reject the State's invocation of the Hayden-Cartwright Act in this case. However, if the direct textual and historical evidence is not dispositive, then the canons of construction surely are.

Those principles are conveniently summarized in *Bryan v. Itasca County, Minnesota,* 426 U.S. 373, 96 S. Ct. 2102, 2113 (1976):

> Finally, in construing this "admittedly ambiguous" statute, *Board of County Comm'rs v. Seber,* 318 U.S., at 713, 63 S.Ct. at 925, we must be guided by that "eminently sound and vital canon," *Northern Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649, 96 S.Ct. 1793, 1797, 48 L.Ed.2d 274 (1976), that "statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Alaska Pacific Fisheries v. United States,* 248 U.S. 78, 89, 39 S.Ct. 40, 42, 63 L.Ed. 138 (1918). See *Choate v. Trapp,* 224 U.S. 665, 675, 32 S.Ct. 565, 569, 56 L.Ed. 941 (1912); *Antoine v. Washington,* 420 U.S. 194, 199-200, 95 S.Ct. 944, 948-949, 43 L.Ed.2d 129 (1975). This principle of statutory construction has particular force in the face of claims that ambiguous statutes abolish by implication Indian tax immunities. *McClanahan v. Arizona State Tax Comm'n,* 411 U.S., at 174, 93 S.Ct., at 1263; *Squire v. Capoeman,* 351 U.S. 1, 6-7, 76 S.Ct. 611, 614-615, 100 L.Ed. 883 (1956); *Carpenter v. Shaw,* 280 U.S. 363, 366-367, 50

S.Ct. 121, 122-123, 74 L.Ed. 478 (1930). "This is so because . . . Indians stand in a special relation to the federal government from which the states are excluded unless the Congress has manifested a clear purpose to terminate [a tax] immunity and allow states to treat Indians as part of the general community." *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 613-614, 63 S.Ct. 1284, 1291, 87 L.Ed. 1612 (1943) (Murphy, J., dissenting).

Surely the evidence that Congress might have contemplated authorization of state taxation of an Indian tribe's own use of its own roads when it enacted the Hayden-Cartwright Act is less substantial than the evidence that Congress contemplated the application of state personal property tax laws to reservation Indians when it enacted 28 U.S.C. § 1360(a).

The Hayden-Cartwright Act falls far short of the clear legislative statement necessary for repeal of Indian tax immunities, especially with respect to tribal use of tribal roads.

CONCLUSION

The judgment below should be reversed and remanded with instructions to grant judgment for the Petitioners for refund of the taxes paid under protest.

Respectfully submitted,

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January 8, 1980

No. 78-1177

In the Supreme Court of the United States

OCTOBER TERM, 1979

WHITE MOUNTAIN APACHE TRIBE, ET AL., PETITIONERS

v.

ROBERT M. BRACKER, ET AL.

ON WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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ON WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

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OPINIONS BELOW

The opinion of the Arizona Court of Appeals (Pet. App. 24a-33a) is reported at 120 Ariz. 282 and 585 P.2d 891. The judgments of the Arizona Superior Court (Pet. App. 19a-23a) are unreported. The order of the Arizona Supreme Court denying review (Pet. App. 37a) is also unreported.

JURISDICTION

The order and opinion of the Arizona Court of Appeals were entered June 29, 1978 (Pet. App. 24a-

35a). A motion for rehearing was denied by that court on August 28, 1978 (Pet. App. 36a). A petition for review by the Arizona Supreme Court was denied on October 4, 1978 (Pet. App. 37a). The petition for a writ of certiorari was filed on December 29, 1978, and granted on October 1, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

QUESTIONS PRESENTED [1]

1. Whether 25 U.S.C. 196, 406, and 407 and 25 C.F.R. Parts 141 and 142, under which Indian reservation timber is comprehensively regulated, preempt the states from taxing the gross receipts of a non-Indian agent of a tribal timber enterprise earned entirely from hauling tribal timber for the Tribe on its reservation on tribal and Bureau of Indian Affairs (BIA) roads.

2. Whether such federal regulation of Indian reservation timber also preempts the states from taxing motor fuel consumption by a non-Indian agent of a tribal timber enterprise used to haul such timber for the Tribe on its reservation on tribal and BIA roads.

3. Whether state taxation of gross receipts of, and motor fuel consumption by, non-Indian agents of a tribal timber enterprise for hauling tribal timber on the reservation on tribal BIA roads as a part of a tribal timber management, harvesting, manufacturing and marketing program infringes on tribal government in violation of the doctrine of *Williams* v. *Lee*, 358 U.S. 217 (1959).

[1] The statement of the questions presented is taken from the petition for writ of certiorari.

STATEMENT

1. Petitioners are the White Mountain Apache Tribe, a federally recognized Indian tribe, and Pinetop Logging Company, a business enterprise made up of two non-Indian corporations that are organized under the laws of Oregon and authorized to do business in Arizona. They brought this action in state court to challenge the applicability of Arizona's motor carrier license and use fuel taxes to Pinetop's Arizona logging operations, which take place entirely on the White Mountain Apache Reservation. Respondents are the Arizona Highway Department, the Arizona Highway Commission, and individual members of each (Pet. App. 24a-1).[2]

The Tribe has, under the authority of 25 C.F.R. 141.6 and the Tribal Constitution, and with the approval of the Secretary of the Interior, organized a tribal logging and sawmill enterprise known as the Fort Apache Timber Company (FATCO) to harvest tribal timber, process it, and sell the products (Pet. App. 25a through 25a-1; A. 15). The timber, which grows on tribal lands, is owned by the United States for the benefit of the Tribe (Pet. App. 25a-1). FATCO is the almost exclusive source of the Tribe's

[2] The First Amended Complaint also named the governor, the attorney general, the state corporation commission, and its members, but those defendants were subsequently dismissed (Pet. 12 n.5).

annual income—providing stumpage payments for timber cut and profits from the sale of products (A. 8-9). FATCO employs a number of the Tribe's members; in 1973 there were about 300 such employees. (A. 8, 15).

FATCO has contracted out to Pinetop and other independent logging companies certain parts of its operation, having found this to be more economical than attempting to conduct the entire operation on its own (A. 12). Pinetop is one of those contractors, and under its contract with FATCO—the terms of which were approved by the BIA—it is authorized to fell and load tribal timber and transport it to FATCO's sawmill in return for monetary compensation specified in the contract (Pet. App. 25a; A. 9-10). In 1974 Pinetop employed about 50 members of the Tribe in its operations (A. 8-9). The activities of FATCO's contract loggers, such as Pinetop, are closely supervised by the BIA through federal regulations (25 C.F.R. Part 141), the contracts it approves, and daily supervision by BIA forestry agents (Pet. App. 25a-1; A. 8, 10, 12-14). Among its regular duties, the BIA "directly selects the trees to be cut, dictates how many trees will be harvested, where logging roads will be built, and how they will be maintained" (Pet. App. 25a-1). The BIA also "controls the type of equipment Pinetop can use to haul lumber, the speeds logging equipment may travel, and the width, length, height, and weight of loads" (*ibid.*).

2. In 1971, the Arizona Highway Department, pursuant to Ariz. Rev. Stat. Ann. § 40-641 (1974) and Ariz. Rev. Stat. Ann. § 28-1552 (Supp. 1978), sought to collect a motor carrier license tax equivalent to 2.5% of Pinetop's gross receipts from its contract carrier operations and an excise tax in the amount of eight cents per gallon of diesel fuel used in Arizona by Pinetop's motor vehicles (Pet. App. 26a).

The motor carrier license tax was imposed on Pinetop because, by virtue of its contract to haul timber for FATCO, it met the statutory definition of "a contract motor carrier of property" (Ariz. Rev. Stat. Ann. § 40-601(A)(7) (1974)); *i.e.*, it was engaged in "the transportation by motor vehicle of property, for compensation, on any public highway," albeit almost exclusively on highways within the White Mountain Apache Reservation that were maintained by the BIA, the Tribe, or the logging contractors themselves (Pet. App. 25a-1; A. 10-11, 12).[3]

The use fuel tax, levied "[f]or the purpose of partially compensating the state for the use of its highways" (Ariz. Rev. Stat. Ann. § 28-1552 (Supp. 1978)), was imposed on Pinetop because it used diesel fuel for "the propulsion of" the vehicles used in its logging operations "on the highways of [the] state" (§ 28-1552 (2)). Payment of the tax is

[3] The term "public highway" is defined as "any public street, alley, road, highway or thoroughfare of any kind used by the public, or open to the use of the public as a matter of right for the purpose of vehicular travel." Ariz. Rev. Stat. Ann. § 40-601(A)(11) (1974).

requested from Pinetop as a user under § 28-1552 (2) rather than from its suppliers as vendors under § 28-1552(1) (Carpenter dep. 89).[4]

3. After Pinetop paid the taxes under protest,[5] it brought this action in state court for a refund, contending that Pinetop is immune from the motor carrier license tax and the state fuel tax insofar as its hauling activities took place exclusively on tribal and BIA roads within the reservation (Pet. 11).[6]

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[4] "Carpenter dep." refers to the deposition of Leland A. Carpenter, transmitted as part of the record to this Court but not included in the printed appendix to the briefs ("A.").

[5] Between November 1971 and May 1976 Pinetop paid, under protest, $19,114.59 in use fuel taxes and $14,701.42 in motor carrier license taxes, and since that time it has continued to pay additional amounts under protest pending the outcome of this litigation (Pet. 11). The State had previously threatened to collect some $30,000 for the years 1969-1971, for which it performed an audit, but it finally agreed to postpone collection of the taxes pending the outcome of the litigation (Pet. 13 n.6). In 1973, the State decided, however, to attempt to collect the $30,000 by levying on Pinetop's equipment (Pet. 13-14 n.6). Petitioners sued state officials in the United States District Court for the District of Arizona (*White Mountain Apache Tribe et al.* v. *Williams et al.*, No. CIV-73-788-PTC WEC) to enjoin collection of those taxes, and the State is now restrained from collecting them under the terms of a consent preliminary injunction; the federal action has been stayed pending the outcome of the present case (Pet. 14 n.6).

[6] Pinetop's vehicles travel on state highways when they are first brought to the reservation, and they also travel on state highways in a few locations on the reservation (Pet. App. 25a-1; A. 11-13; Carpenter dep. 24-25). Pinetop has maintained records of the fuel attributable to travel on state highways, and it concedes its liability for the tax attributable to that travel (Pet. App. 25a-1; Pet. 11).

It also contended that, even assuming the State could tax those activities, it was entitled to a "pulpwood exemption" from the motor carrier license tax, pursuant to Ariz. Rev. Stat. Ann. § 40-601(A)(10) (1974). The Tribe subsequently intervened as a plaintiff after having agreed to reimburse Pinetop for the taxes to be paid if Pinetop was unsuccessful in this lawsuit.[7]

The trial court granted summary judgment for the state defendants (Pet. App. 19a-23a), holding that the taxes in question were lawfully imposed on Pinetop and that Pinetop was not entitled to claim the "pulpwood exemption" from the motor carrier license tax.

The Tribe and Pinetop appealed to the Arizona Court of Appeals, which affirmed the trial court's conclusion that Pinetop was subject to the state taxes, but reversed the portion of the trial court's decision holding that Pinetop could not claim the pulpwood exemption, which the appellate court found to be applicable to 60% of Pinetop's gross revenues (Pet. App. 24a-33a). The Arizona Supreme Court declined to review the intermediate appellate court's decision (Pet. App. 37a).

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[7] Petitioners filed an affidavit by the manager of FATCO, stating that when the contract between Pinetop and FATCO was negotiated, the parties believed that Pinetop was not liable for the taxes, and that when the State attempted to levy these taxes, FATCO found it necessary, in order to avoid the loss of Pinetop's services, to agree to reimburse Pinetop for any such taxes it might be required to pay respecting future operations (Pet. App. 26a; A. 11-12).

ARGUMENT

THE STATE MAY NOT VALIDLY IMPOSE ITS MOTOR CARRIER LICENSE TAX OR ITS USE FUEL TAX ON PINETOP'S ON-RESERVATION ACTIVITIES BECAUSE SUCH TAXATION IS PREEMPTED BY PERVASIVE FEDERAL REGULATION OF THOSE ACTIVITIES AND CONSTITUTES AN INFRINGEMENT OF TRIBAL SELF-GOVERNMENT

A. Introduction And Summary

All of the activities to which the state taxes at issue in this case apply have taken place within the confines of the White Mountain Apache Reservation: the reservation is the site of the logging and hauling that produce the income and consume the diesel fuel on which the State seeks to impose those taxes. The court below considered this fact of no significance because Pinetop is a non-Indian business (Pet. App. 28a).

We recognize, of course, that a state's power to tax or otherwise regulate activities occurring within its borders does not automatically terminate at the boundary of an Indian reservation, and that a state's interest in regulating the activities of non-Indians has, in particular circumstances, been found sufficient to warrant the exercise of its authority with respect to on-reservation activities. See, *e.g.*, *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, 481-483 (1976); *New York ex rel. Ray* v. *Martin*, 326 U.S. 496 (1946); *Utah & Northern Ry.* v. *Fisher*, 116 U.S. 28 (1885). We find nothing in the decisions of

this Court, however, that compels the conclusion that a state may, in all circumstances, tax or regulate the activities of non-Indians occurring on a reservation. Indeed, this Court's decision in *Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685 (1965), is authority expressly to the contrary; and it summarizes the principles which distinguish those situations in which a state is free to tax or regulate activities notwithstanding their reservation locus from those in which the state's interest is out-weighed by the more substantial interests of the federal government or the tribe concerned, or both.

In *Warren Trading Post*, this Court held that the State of Arizona was not free to impose a two percent tax on a federally licensed non-Indian trading company's sales to Indians through a retail trading post located on a reservation. The Court found that comprehensive federal regulation of traders left "no room" for state laws "imposing additional burdens" upon them (*id.* at 690) and that the state tax—whether it fell on the trader or directly on the Indians with whom the trader dealt—could frustrate the congressional purpose of protecting Indians against unfair or unreasonable prices (*id.* at 691). Under familiar principles of federal preemption, that particular exercise of the State's taxing power accordingly had to yield.[8]

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[8] A state law is preempted where either Congress has occupied the field with respect to the subject matter the state law seeks to regulate or the state law conflicts with federal law. *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 157-158 (1978); *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525-526 (1977). A

But, as this Court subsequently pointed out (*McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 170 n.6 (1973)), federal preemption was not the only basis for the holding in *Warren Trading Post*. That decision also stressed that the Navajos had long been "largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities." *Warren Trading Post, supra*, 380 U.S. at 690. This invocation of the tradition of Indian independence made it clear that tribal sovereignty remained an interest to be considered when weighing a state's claim that it is entitled to subject to its laws a particular activity occurring within reservation boundaries. That interest had been defined in *Williams* v. *Lee*, 358 U.S. 217, 220 (1959), as the right, "absent governing Acts of Congress," to be free of state action that "infringe[s] on the right of reservation Indians to make their own laws and be ruled by them." Accord, *Fisher* v. *District Court*, 424 U.S. 382, 386 (1976); *McClanahan* v. *Arizona State Tax Commission, supra*, 411 U.S. at 171.

These separate grounds for the holding in *Warren Trading Post*—federal preemption and protection against infringement of tribal self-government—both

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conflict may be found both where it is impossible for a person to comply with both state and federal law and where the state law simply "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Ray* v. *Atlantic Richfield Co., supra*, 435 U.S. at 158, quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

support our contention in this case that the State is not free to levy its motor carrier license tax and its use fuel tax in connection with Pinetop's reservation operations, at least where travel over state-maintained roads is not involved. Those distinct rationales coincide in this case, however, because as we show below, pervasive federal regulation of the entire timber enterprise, through statutes, regulations, BIA-approved contracts, and daily supervision of Pinetop's activities by BIA agents, reflects in part a congressional purpose of encouraging the economic self-sufficiency of Indian tribes as a means of strengthening tribal government. The intrusion of the State's taxing power into the federal scheme, we submit, frustrates congressional objectives when it threatens the economic base for tribal self-government and the residual authority of the Tribe over its own territory.

B. Federal Preemption

1. *The Statutory Background*

Although it is not subject to the licensing requirements applicable to the trader in *Warren Trading Post*,[9] Pinetop is engaged in selling to Indians on a reservation. It sells its services to FATCO, a tribal enterprise, under authority of the functional equivalent of a federal license: its series of contracts with

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[9] References to "goods" in statutory provisions and regulations governing licensed Indian traders (see, *e.g.*, 25 U.S.C. 264; 25 C.F.R. 251.3, 251.6), and the commonly accepted meaning of the term "trader," make it clear that sales of services are not governed by these provisions.

FATCO, each of them approved—and even to a considerable extent drafted (A. 14)—by BIA agents.[10]

The activities involved in the operation of a timber enterprise on an Indian reservation are as comprehensively regulated by the federal government as is the business of trading on an Indian reservation. In regulating those timber activities, the Secretary of the Interior is carrying out the intent of Congress —evidenced in statutes relating directly to timber harvesting—of seeing that timber on tribal lands is harvested according to proper forest management principles and sold in a manner that benefits the tribes concerned. But he is also implementing the broader congressional policy of fostering Indian economic self-sufficiency—itself embodied in a number of statutes.

a. Federal policies respecting timber on tribal lands have evolved. Once upon a time, the position was that Indians had no beneficial rights in such timber. Today, the government recognizes an obligation to regulate the harvesting of timber to assure that timber lands will continue to provide a source of economic support for the tribes.

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[10] The fact that the sale is to a tribal business that could itself be taxed if it operated outside of the reservation (*Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973)) is not a significant distinction. Individual members of tribes can themselves be taxed on income they earn as citizens living and working beyond the reservation boundaries. *Id.* at 148-149.

In *United States* v. *Cook*, 84 U.S. (17 Wall.) 168 (1872), and in *Pine River Logging Co.* v. *United States*, 186 U.S. 279 (1902), this Court held that, under the then-existing statutory scheme regulating the use of Indian land, individual Indians had no right to sell living timber on reservation lands unless the sale was incidental to the improvement of the land—for example, clearing for cultivation. Through misinterpretation of these decisions, the administrative agencies of the government, both the Department of Justice and the Department of the Interior, ruled that Indians had no right to reservation timber and that where reservation timber had been cut by trespassers, the timber should be sold by the General Land Office and the proceeds from the sale credited to the government absolutely, rather than to a tribal trust account. See, *e.g.*, 19 Op. Att'y Gen. 194 (1888); 19 Op. Att'y Gen. 710 (1890).

Well before the fallacy of these interpretations was exposed in *Shoshone Indians* v. *United States*, 85 Ct. Cl. 331 (1937), aff'd, 304 U.S. 111 (1938), Congress overturned the rulings by the Act of June 25, 1910, ch. 431, 36 Stat. 855, revising the Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388. In Sections 7 and 8 of the 1910 Act, 36 Stat. 857, (current versions at 25 U.S.C. 407 and 406(a), respectively), Congress provided for the sale of timber from allotted and unallotted Indian lands for the benefit of

Indians. Section 8 authorized an allottee, with the consent of the Secretary to sell timber from his allotment, the proceeds to go to the benefit of the allottee under regulations to be prescribed by the Secretary. Section 7 provided for the sale of living and dead timber on unallotted lands under regulations to be issued by the Secretary, with the proceeds to be used "for the benefit of the Indians on the reservation" in such manner as the Secretary might direct. (By the Act of April 30, 1964, Pub. L. No. 88-301, 78 Stat. 186, Congress amended 25 U.S.C. 406 and 407 to include the requirement that timber be harvested in accordance with the principle of sustained-yield management.) These provisions of the 1910 Act were enacted at the request of the Secretary, who had pointed out in a letter to the House of Representatives that if timber could be cut from unallotted Indians lands, "it would furnish employment to Indians who now are unable to find work [and] * * * funds for tribal uses which could take the place of funds that must now be appropriated from the Treasury for their support." H.R. Rep. No. 1135, 61st Cong. 2d Sess. 3 (1910).[11]

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[11] This echoed an earlier House Report on the bill enacted as the Act of March 28, 1908, ch. 111, 35 Stat. 51, a bill concerning the harvesting of timber on the Menominee Reservation. The House Committee noted that the establishment of sawmills on the reservation would provide year-round employment and that the Indians, under federal supervision, could manage and harvest the lands so as to enjoy dependable income from a continuous supply of timber. H.R. Rep. No. 1086, 60th Cong., 1st Sess. 1-2 (1908). See also S. Rep. No. 110, 60th Cong., 1st Sess. 2 (1908).

b. In 1934, the opportunities for Indian tribes to use the timber on their lands as a source of economic support for their members were enhanced by the enactment of the Indian Reorganization Act (the Wheeler Act), 25 U.S.C. 461 *et seq.* This statute manifested a sharp change of direction in federal policy toward the Indians, replacing the bias of the Indian General Allotment Act toward encouraging Indians to become individual farmers and landowners with measures to assist Indians in reviving their tribal organizations. The new policy was a response to unfortunate consequences of the Indian General Allotment Act: increasingly larger numbers of impoverished Indians stripped of some of their most productive lands—lands that were the most promising basis for a viable tribal economy. See S. Rep. No. 1080, 73d Cong., 2d Sess. (1934); Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. Rev. 535, 536 and nn. 7 & 8 (1975).

In the Reorganization Act, Congress prohibited further allotment of Indian land (Section 2, 25 U.S.C. 462), provided for acquisition by the government of lands or rights in land for the use of the tribes (Sections 5 and 7, 25 U.S.C. 465 and 467), mandated exemption of such lands and rights in land from state taxation (Section 5, 25 U.S.C. 465), provided for tribal constitutions (Section 16, 25 U.S.C. 476), enabled tribes to form themselves into corporations with federal financial assistance (Sections 9 and 17, 25 U.S.C. 469 and 477), and authorized the Secretary to make loans to Indian corporations "for the pur-

pose of promoting the economic development of * * * tribes and their members" (Section 10, 25 U.S.C. 470). In Section 6 of the Indian Reorganization Act, 25 U.S.C. 466, Congress directed the Secretary to make rules and regulations for the management "of Indian forestry units on the principle of sustained-yield management."

As this Court has suggested in *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 151 (1973), the thrust of the Act as a whole was to encourage tribes "to revitalize their self-government," to take control of their "business and economic affairs," and to assure a solid territorial base by "put[ting] a halt to the loss of tribal lands through allotment."

The provisions of the Indian Reorganization Act survived the 1950's, when federal policy, embodied in the Termination Acts and Public Law No. 280 (Act of Aug. 15, 1953, ch. 505, 67 Stat. 588), moved away from the emphasis on strengthening tribal autonomy toward a goal of assimilating the Indians into the general society. See generally, *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968); Goldberg, *supra*, 22 U.C.L.A. L. Rev. at 536. And, more recently, Congress has returned to the approach of the Indian Reorganization Act. In such measures as the Indian Financing Act of 1974, 25 U.S.C. 1451, *et seq.*, and the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. 450, *et seq.*, and in the provisions of the Indian Civil Rights Act of 1968 prohibiting further state assumptions of jurisdiction except with tribal consent (25 U.S.C. 1321-1322), Congress has attempted to assure the viability of

tribal government in the face of both economic and political challenges.

c. With regard to the management of timber on tribal lands, the Secretary of the Interior has promulgated regulations (25 C.F.R. Part 141) under authority of some of the statutes discussed above—regulations that reflect the general legislative policy of protecting forest lands and, at the same time, encouraging tribal economic self-sufficiency.[12] The regulations provide for two distinct methods of sale of timber. The tribe can offer its timber for sale, through advertisement and bid procedures, to a non-Indian timber company. See 25 C.F.R. 141.8, 141.10-14. Or the tribe can establish logging and sawmill enterprises to undertake the harvest of timber and its conversion into marketable lumber. 25 C.F.R. 141.6. If a tribal enterprise is established, the tribe can sell the timber to the enterprise without the necessity of advertisement or a formal contract, although the stumpage rates are set by the Secretary. Obviously, a tribal enterprise—which sells processed lumber rather than standing timber—holds out the promise of a greater economic return for the tribe.

Whether a tribe chooses to sell to a non-Indian logger or to establish a logging and milling enter-

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[12] 25 C.F.R. Part 142 prescribes terms and conditions for the sale of products produced by tribal enterprises from the tribal timber. Those regulations do not, in all cases, apply to sales by Indian enterprises "that have entered into approved agreements" under 25 C.F.R. 141.6 (see 25 C.F.R. 142.3), and it is not clear from the record whether they would apply to sales of lumber by FATCO.

prise itself, the timber harvesting operations are conducted pursuant to a management plan prepared by the BIA (25 C.F.R. 141.4), which incorporates the objectives for the management of unallotted Indian forest lands set out in 25 C.F.R. 141.3. Those objectives include preservation of Indian forest lands "in a perpetually productive state" (25 C.F.R. 141.3(a)(1)) and "[t]he development of Indian forests by the Indian people for the purpose of promoting self-sustaining communities" (25 C.F.R. 141.3(a)(3)).

The BIA works toward these ends not only through its management plans, but also through its review and approval of contracts such as those entered into by FATCO and Pinetop, and through daily supervision by BIA agents of the logging and hauling. As authorized by 25 U.S.C. 407 and 413, and 25 C.F.R. 141.18, the BIA usually deducts from the gross proceeds of the sale of timber a reasonable fee for its costs of managing and protecting the forest lands and administering sales. The fee is normally 10% of the gross proceeds, although no more than 5% will be charged "when the timber is sold in such a manner that little administrative expense" is required (25 C.F.R. 141.18).

d. Federal regulations with respect to roads on Indian reservations (see 25 C.F.R. Part 162) also govern aspects of the operation of a tribal timber enterprise, since felling trees and hauling the timber to the sawmill involve heavy use of reservation roads, with attendant maintenance expense, and sometimes require the construction of new logging roads in re-

mote areas. The Commissioner of Indian Affairs is authorized to enter into agreements with Indian tribes and with individual States for the construction and maintenance of reservation roads (25 C.F.R. 162.6 and 162.7). When he enters into a construction and maintenance agreement with a tribe that requires contributions from tribal funds, however, the regulations require that he assure that the tribe is "able to make such contributions without undue impairment of the necessary tribal functions" (25 C.F.R. 162.6a).

2. *Obstruction of the Federal Scheme*

The BIA agents, FATCO, and Pinetop work together to operate the tribal timber enterprise within the statutory and administrative framework described above. Pinetop's contracts with FATCO, approved by the BIA, define many other terms of the relationship. We believe that here, as in *Warren Trading Post, supra,* federal regulation of the area leaves "no room" for the "additional burdens" (380 U.S. at 690) imposed by the State. Nor is it simply a matter of federal "occupation of the field." The imposition of these taxes has the potential to frustrate congressional objectives respecting such enterprises.

a. As noted, Congress has provided that "reasonable fees" for services furnished the Indians by the federal government may be collected by the Secretary from the proceeds of sales (25 U.S.C. 407 and 413), and it is the duty of the Secretary to determine

an appropriate fee for such services (see 25 C.F.R. 141.18). In setting these fees, in determining stumpage rates for the timber to be paid to the Tribe, and in reviewing and approving the terms of agreements with contractors like Pinetop, the Secretary—acting through the BIA—can assure that congressional policies respecting the use of tribal timber are carried out. For example, it is for the BIA, in consultation with FATCO, to determine what standards to apply in selecting contractors to carry out functions in the tribal timber enterprise—in Pinetop's case, to engage in its business of logging and hauling on the reservation. Similarly, the BIA, FATCO, and the contractor must decide how to allow for operational costs, such as fuel costs, in calculating the contract price and how to deal with the matter of road maintenance required by the logging and hauling operations—whether the expense of such maintenance will be borne by the tribe directly, by the BIA, or by the contractor. As the record shows, the roads used in the operation are mostly those built and maintained by the Tribe and the BIA, but Pinetop constructs some logging roads, and both Pinetop and FATCO are charged with the costs of repairing roads in proportion to their respective uses of the roads (A. 10, 13; Carpenter dep. 71).

The Secretary must make all of these determinations in a way that will serve the congressional purposes respecting Indian tribal timber enterprises. The imposition of the "additional burdens" of the State's motor carrier license tax and use fuel tax on

Pinetop's gross income from its logging and hauling and the fuel it consumes in driving over the non-state roads has no place in this federal scheme.[13]

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[13] In the Arizona Court of Appeals, respondents argued that Congress had indicated its intent to permit such taxes in the Buck Act, 4 U.S.C. 105-110, a statute permitting the States to levy sales or use taxes within "Federal" areas. This Court, however, held in *Warren Trading Post, supra,* 380 U.S. at 691 n.18, that the Buck Act does not apply to Indian reservations. It noted further that even if it did apply generally, nothing in the Act suggested that Congress had "meant to give States new power to tax federally licensed Indian traders." *Ibid.*

In the Arizona Superior Court (but not in the Arizona Court of Appeals), respondents, in making their use tax argument, relied on 4 U.S.C. 104, a provision authorizing states to levy certain types of taxes on motor fuel, including taxes "measured by * * * use," where the fuel is "sold by or through post exchanges, ship service stores, commissaries, filling stations, licensed traders, or other similar agencies, located on United States military and other reservations, when such fuels are not for the exclusive use of the United States." (Despite this literal limitation to sales on a reservation, the statute has been construed to cover use taxes on withdrawal of motor fuel from storage on a federal reservation, where sale of the fuel has not been taxed by the States. *Matter of State Motor Fuel Tax Liability of A.G.E. Corp.*, 273 N.W. 2d 737 (S. Dak. 1978); *Sanders* v. *Oklahoma Tax Commission*, 169 P.2d 748 (Okla.), cert. denied, 329 U.S. 780 (1946)).

The original version of this provision was enacted in 1936 as Section 10 of the Hayden-Cartwright Act, ch. 582, 49 Stat. 1521-1522; and it was amended by Section 7 of the Buck Act in 1940, ch. 787, 54 Stat. 1060-1061. While it is possible that this statute could apply in some circumstances to fuel used or sold on Indian reservations (see *Matter of State Motor Fuel Tax Liability of A.G.E. Corp., supra; Application of Federal and State Sales Taxes to Activities of Menominee Indian Mills*, 57 Interior Dec. 129, 137-141 (1940)), its general application cannot be assumed where an Indian reservation is con-

b. The court below gave two reasons for dismissing this burden as without significance. First (Pet. App. 30a), it cited decisions of this Court in intergovernmental tax immunity cases declining to invalidate State taxes which, although ostensibly imposed on private parties, in effect fall upon the federal government by increasing its costs. *E.g.*, *United States* v. *City of Detroit*, 355 U.S. 466, 469 (1958). But this is no answer to the question whether Congress has created a legislative scheme that could be disrupted by the imposition of unanticipated taxes on a private contractor in a manner that will necessarily reduce the profitability of the tribal timber enterprise. Indeed, the same argument could have been made with respect to the tax involved in *Warren Trading Post*.

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cerned, given the principle that federal tax laws are not to be lightly read as abridging Indian tax immunities. See *Bryan* v. *Itasca County*, 426 U.S. 373, 392-393 (1976); *Squire* v. *Capoeman*, 351 U.S. 1, 6-7 (1956). Applying the provision here would in no way serve the purpose of the Hayden-Cartwright Act, which was enacted to assist the states in their highway building programs by providing federal matching funds. Section 10 was added to the bill as a floor amendment by Senator Hayden, who indicated that it would end an unfair practice of motorists who used state highways but escaped the State's gasoline taxes by purchasing their fuel on federal reservations. 80 Cong. Rec. 6913 (1936). See *Minnesota* v. *Keeley*, 126 F.2d 863, 864-865 (8th Cir. 1942). Here, of course, Pinetop has agreed to pay the tax respecting travel on roads built and maintained by the State, and the State seeks taxes attributable to travel on roads for which the Tribe or the BIA or Pinetop have borne the maintenance or construction costs.

Second, the court (Pet. App. 30a-2) described the taxes as amounting to about $9,000 and suggested that they were de minimis when compared with the Tribe's annual "net revenues * * * exceed[ing] $1,500,000 per year" (Pet. App. 30a-2). In fact, there is no clear basis in the record for this calculation of the amount of the taxes imposed on Pinetop. Furthermore, Pinetop was only one of six logging contractors working in the timber enterprise (A. 11-12), and the taxes would presumably apply to all. Finally, the State sets its tax rates and determines the type of income and fuel use to which they will apply without considering the impact this will have on the Tribe, FATCO, or any of FATCO's contractors. Thus, whether tribal resources are abundant or meager, and regardless of how serious their impact on the success of the timber operation, the State would presumably seek to collect whatever taxes it determined were owing. The State has no duty to assure that the timber enterprise will function in a manner that will bring the Tribe closer to economic self-sufficiency. The Secretary does have such a duty, however, and his performance of his task clearly may be obstructed by the intrusion of this State taxation system.

c. In addition to representing an economic burden with the potential for disrupting the congressional scheme respecting tribal timber enterprises, the State's assertion of its taxing authority over activities occurring solely within the reservation treats the reservation boundary as having no greater significance than the boundary of a suburban shopping mall. This

implicitly denies the Tribe's status as "a separate people," occupying at least "a semi-independent position." *McClanahan* v. *Arizona State Tax Commission*, *supra*, 411 U.S. at 173, quoting *United States* v. *Kagama*, 118 U.S. 375, 381-382 (1886). It is, moreover, at odds with the congressional policy of revitalizing tribal self-government and, with it, some measure of tribal authority over the territory occupied by those that have maintained the tribal relation. Because this aspect of the State's action may be characterized as an infringement on tribal self-government, and hence an independent ground for holding that these taxes may not be imposed with respect to Pinetop's work on the reservation (see pages 8-9, *supra*), we address it separately in the following section.

C. Infringement Of Tribal Self-Government

In imposing its motor carrier license tax on the income from Pinetop's reservation hauling operations, the State is, in the words of the Arizona Court of Appeals (Pet. App. 28a-1), imposing "a tax on the privilege of doing business in [the] state." More precisely, however, the State is imposing its tax on Pinetop for the privilege of doing business on the Tribe's reservation. Similarly, while the State levies its use fuel tax "[f]or the purpose of partially compensating the state for the use of its highways" (Ariz. Rev. Stat. Ann. § 28-1552 (Supp. 1978)) and applies the tax to fuel "used in the propulsion of a motor vehicle on any highway within the state" (*ibid.*), it is, in more precise terms, taxing fuel

used in the propulsion of motor vehicles on roads within the reservation built and maintained by the Tribe, by the BIA or—under the terms of its contract with the tribal enterprise—by Pinetop.

The State, of course, would not undertake to charge motor carriers for the privilege of doing business in neighboring States, nor does it purport to tax the consumption of fuel on public highways in other States. Indeed, the statutory presumption that fuel placed in the tanks of motor vehicles will be "consumed in propelling the vehicle on the highways of this state" (Ariz. Rev. Stat. Ann. § 28-1556 (Supp. 1978)) may be rebutted by a showing that the fuel was not so consumed (§ 28-1551(10)). And where a motor carrier operates "partly within and partly without" the State, it pays the motor carrier license tax only on the gross receipts from its intrastate business and on that proportion of its remaining gross receipts equal to the proportion of its "mileage within the state" relative to "the entire mileage over which business is done" (§ 40-641(B) (1974)).

We do not, of course, suggest that the sovereignty of a tribe is identical to that of a state. But certainly where the state has no special interest in the particular matter involved, the state's assertion of power should yield. The State's only discernible interests here are a general desire to augment its revenues and a specific aim of recovering from the users of state highways some of the expenses of their construction and maintenance. Were the first interest

deemed sufficient, states would be free to tax on-reservation activities with impunity so long as they avoided the appearance of imposing a tax directly on a tribe, its members, or a tribal alter ego such as FATCO. The second interest is not vindicated by collecting the taxes at issue here because, as we have noted (page 6, note 6, *supra*), Pinetop is resisting the payment only of taxes related to travel over roads maintained by the Tribe, the BIA, or by Pinetop itself.

These taxes thus resemble the state fishing license requirement struck down in *Eastern Band of Cherokee Indians* v. *North Carolina Wildlife Resources Comm'n*, 588 F.2d 75 (4th Cir. 1978), petition for cert. pending, No. 78-1653, insofar as it applied to fishermen (including non-Indian fishermen) on the Band's reservation. There, after noting that the reservation streams were stocked by the federal government as an aid to a commercial fishing venture that "bolster[ed] the Band's economic well-being" (*id.* at 78), the court noted that North Carolina had, in contrast to the tribe, "no perceivable interest in reservation fishing" (*ibid.*). In that case, as in this, even granting that a state may in some circumstances have an interest warranting an extension of its licensing and taxing powers to activities of non-Indians on an Indian reservation, the State's interest is simply insufficient to warrant the intrusion, particularly where it threatens the economic base that sustains tribal self-government.

Finally, this is not a case in which the party on which the tax ostensibly falls can be said to have located its operations on the reservation in an effort to evade taxes it would otherwise be required to pay. Pinetop is engaged in hauling timber and burning fuel on the reservation because that is where the tribal timber and the tribal sawmill are located and because the terms on which Pinetop has agreed to furnish its services to FATCO are consistent with federal policies relating to tribal timber enterprises. Pinetop's activities there impose no burden on the State for which the State could justly look for recompense.

CONCLUSION

The judgment of the Arizona Court of Appeals should be reversed.

Respectfully submitted.

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